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# MONROE'S DIGEST

OF

## STANDARD DECISIONS

OF

### THE COURTS OF LAST RESORT

OF THE

United States, Canada, England, Scotland and Ireland,

UPON QUESTIONS IN LAW AND EQUITY RELATING TO

BANKS, BANKING, COMMERCE, TRADE  
AND MANUFACTURING.

EDITED BY

JAMES H. MONROE,

Counsellor-at-Law.

*The Courts have held, that "There is no protection for the rash against the consequences of their imprudent contracts."*

*Ignorance of the law is not accepted as an excuse for errors or omissions.*

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## P R E F A C E .

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The author has sought to form a comprehensive and concise compilation of the standard decisions of the Courts of final resort relating to questions daily arising in the business relation of all branches of human endeavor. All business men can refer to these decisions with confidence as a guide in all their respective dealings.

The precise manner in which these important decisions are expressed, enables the reader to gain a clear and comprehensive understanding and application of the imperative rules of law that are made to govern the business operations of man, in the various departments of human effort. They also enable those acting under them, not only to protect and promote their own personal interests, but they will aid greatly in diminishing the perpetration of fraudulent transactions, by reducing the opportunities for committing them.

Everyone who issues or receives checks, drafts and promissory notes, or make contracts of any kind, will find that the Digest is well calculated for aiding them to protect their rights and prevent wrong doing.

A ready and trustworthy means of acquiring a knowledge of the rules and regulations established by law, will not only frequently prevent present expensive litigation, but will also enable one to create a practical basis of action, upon which your attorneys can more effectively defend your rights and promote your interests. If you fail to manage your business affairs in conformity with these established rules and regulations, to which you are amenable always, your lawyer, let him be ever so capable and energetic, cannot maintain your rights or promote those interests which you may have neglected or endangered, either through carelessness or a want of legal information.

JAMES H. MONROE.







# MONROE'S DIGEST

—OF—

## STANDARD DECISIONS.

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### ABATEMENT AND REVIVAL.

1. The revival of an action does not necessarily carry with it the whole of the prior right of action. *Cregin v. Brooklyn*, C. T. R. R. Co. 83 N. Y. 595.

2. An action abates when it is defeated and the legal power to continue it has terminated. *Frost v. Kopp*, Civil Procedure, New York City.

### ACCEPTANCE.

3. *Verbal acceptance of an order* drawn on a party is binding on him, and his statement, when presented with the order, that he could not then pay it, but would pay the same, is equivalent to an acceptance. *St. Louis National Stock Yards v. O'Reilly, et al.*, 85 Ill. 546.

4. An acceptance, to be binding, must in every respect meet and correspond with the offer made; neither falling within nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them as they stand. A proposal to accept an offer on terms varying from those proposed amounts to a rejection of the offer, and a substitution of a counter proposition, which cannot become a contract until assented to by the first proposer. The original offer loses its vitality, and is no longer pending between the parties, and becomes an open proposition again only when renewed by the party who first made it. The party submitting a counter proposition, cannot, without the consent of the first proposer, withdraw or abandon the same, and then accept the original offer which he has once rejected. *Fox v. Turner*, 1 Bradwell's Ill. App. Rpts. 153.

5. An acceptance without conditions, limitations, or provisions, or otherwise changing the terms of the offer, is binding as soon as the acceptance letter is mailed. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. U. S. 390; *Hutchinson v. Blakeman*, 3 Met. Ky. 80.

6. An offer made by mail may be revoked by telegraph, by messenger, or in any other way, provided the notice of withdrawal be conveyed in time, i. e., before the party has mailed his letter accepting the offer. *Ibid.*



7. Any qualification of, or departure from, the terms in which the offer is made, invalidates the offer, unless the same be agreed to by the person who made it. *Gleason v. Hanshaw*, 4 Wheat. U. S. 225.

8. Acceptance of a lesser sum does not, ordinarily, bar a demand for a greater. *White v. Kuntz*, 107 N. Y. 518.

9. The acceptee can no more overtake and countermand by telegraph his letter mailed, than he can his words of acceptance, after they have issued from his lips on their way to the hearer. *Hallock v. Conn. Ins. Co.*, 2 Dutch. 281, per Vredenburg, J., N. J.

10. Where an offer is made between persons present, it is, in ordinary cases, deemed to be revoked, unless accepted before the parties separate. *Mactier v. Frith*, 6 Wend. N. Y. 103; *Averill v. Hedge*, 12 Conn. 424.

11. When an offer is made by mail, it is presumed to continue until the person to whom it is made has a reasonable time in which to accept or reject it. This, it is understood in mercantile cases, means by return of mail. *Dunlop v. Higgins*, 1 H. of L. Eng. 381; *Averill v. Hedge*, 12 Conn. 424.

12. In many cases the reasonable time will depend upon the circumstances and nature of the business. *Loring v. City of Boston*, Metc. Mass. 409; *Peru v. Turner*, 1 Fairf. Me. 185.

13. In some cases the nature of the offer requires no letter of acceptance of the terms offered, is necessary in order to create a contract, and the person receiving the offer may accept simply by acting upon it without communicating with the offerer. *Lungstrass v. German Ins. Co.*, 48 Mo. 201.

14. As were offers of reward for the detection of offenders, or the recovery of property and the like, and orders for goods. *Freeman v. City of Boston*, 5 Metc. Mass. 56; *Loring v. City of Boston*, 7 Metc. Mass. 409; *Fitch v. Snedaker*, 38 N. Y. 248; *Williams v. Carwardine*, 4 Barn. and Ad. Eng. 621; *Thomson v. James*, 18 Dutch. Eng. 1; *Cook v. Ludlow*, 5 Bos. and P. 2 N. R. Eng. 119.

15. So also, wherever it is necessary for a party to express his dissent, if he does not agree to a proposition, and he makes no reply, his assent can be presumed. 1 Statute on Cont. Eng. 444.

16. The rules of law in contracts made by mail are applicable to those made by telegraph. *Trevor v. Wood*, 36 N. Y. 307; *Duble v. Balls*, 38 Tex. 312; *Wells v. Milwaukee, Etc., R. R. Co.*, 3 Wis. 605; *Schonberg v. Cheney*, 3 Hun, N. Y. 617.

17. Where an order for any article, such as lottery tickets, was sent from a state where the sale of such tickets are prohibited by law to another state, where the sale of such tickets was lawful, and where the assent was given, and not in that where it was received, assent is binding. *McIntyre v. Parks*, 3 Metc. Mass. 207; *Newcomb v. DeRoos*, 2 El. Eng. 271; *Waldron v. Richings*, 3 Daly N. Y. 288.



## ACCOMMODATION.

18. The fact that the drawer presents the draft to the payee, with the acceptance of the drawees on it, is out of the usual course of business, and a circumstance indicating to the payee the accommodation character of the acceptance. *Bloom v. Helm*, 53 Miss. 21.

## ACCOUNT STATED.

19. It seems that to give to an account delivered the force of an account stated, because of silence on the part of the party receiving it, the circumstances must be such as to justify an inference of assent, upon his part, to its correctness. Where he has disclaimed all liability upon the account, he is not bound to examine the items, upon its delivery to him, and his omission to object will not be taken as an admission of their correctness, and is not *prima facie* proof of the account. *Guernsey v. Rexford*, 18 Sickels, N. Y. 631.

20. The mere rendering of an account does not make it an account stated, and an omission to object to it raises only a presumption of assent, which may be rebutted by circumstances tending to a contrary inference. *Ibid.*

21. An account stated is presumptive evidence only of the balance admitted to be due, and may be corrected for fraud or mistake. On the settlement of accounts, the parties may, by agreement, limit the time within which claim for the correction of mistakes or omissions shall be made; and in such case, evidence of an omitted demand may be excluded, unless proof be made of claim for its allowance within the time agreed upon by the parties. *Vandever v. Statesir, Adm'r*, 39 N. J. Law, 593.

22. For a period of two years A. kept an account with a bank, for money loaned, checks paid, and credits for deposits and payments; the bank during the time making monthly statements, striking the balance due each month, which was carried forward and charged against A. *Held*, that the monthly balances were not distinct settlements, but that the whole constituted a running account, and was, in effect, but one transaction. *Pickett, et al. v. Merchants' Nat. Bank of Memphis, et al.*, 32 Ark. 346.

23. An account stated can only be opened where the party objecting shows clearly that he has been misled by fraud, mistake or manifest error. *Harley v. Eleventh Ward Nat'l Bank*, 76 N. Y. 618.

## ADMINISTRATORS.

24. The written acknowledgment of a debt by an administrator will not bind the succession if such debt does not really exist. An administrator cannot avail of any defect in a legal proceeding caused by his fault. *Succession of Margaret McAuley*, 29 La. 33.



## ADMISSIONS AND DECLARATIONS.

25. Declarations of assignor for benefit of creditors made after delivery of possession under assignment, not competent against the assignee. *Coyne v. Weaver*, 84 N. Y. 386.

26. One joint debtor cannot bind another by his statements or admissions unless he is the agent or in some way the representative of the other and authorized to speak for him; the mere fact of joint liability does not give the authority. *Wallis v. Randall*, 81 N. Y. 164.

27. The title of the assignee of a non-negotiable promissory note cannot be affected by declarations of the assignor, made after the assignment. *Van Gelder v. Van Gelder*, 81 N. Y. 625.

28. The effect of the admissions of a party as evidence is not destroyed by proof if otherwise uncontradicted, contrary to the admissions, but they raise a question of fact for a jury. *Greenwood v. Schumacker* (Mem.) 82 N. Y. 614.

## ADVICE OF COUNSEL.

29. Where a party, in good faith, consults with a licensed attorney, and acts upon his advice in making a complaint for the arrest of another, he may show that fact in defence, and it is not incumbent on him to go further and show that such attorney was a man learned and skilled in his profession. *Horne v. Sullivan*, 83 Ill. 30.

30. A party seeking the advice of counsel as to commencing a criminal prosecution must act in good faith and without gross negligence, and not withhold any information with an intent to procure an opinion that might operate to shelter and protect him against a suit.

31. If a party culpably or negligently withholds from counsel any material fact, the advice will not protect him. But where the counsel advised with is already conversant with a material fact, by being an attorney of the party in a prior suit, it will not be necessary for the party to give him information of it. He may, in such case, presume the counsel has knowledge as to such fact, without being chargeable with bad faith. *Per Breese, J., Brown v. Smith*, 83 Ill. 291.

## AGENTS.

32. Where an agent to loan money takes insufficient security, the principal is not bound, at his peril, to accept and discharge the agent, or to reject the security and look only to the responsibility of the agent. The principal, in such case, may take the security, and still hold the agent bound for any deficiency which, after due diligence, he suffers on it. *Guernsey et al. v. Rexford, Adm. Applt*, 18 Sickels, N. Y. 631.

33. In an action for liquors sold and delivered, to which the defence was that the goods were sold to a third person, there was evidence that the defendant told the plaintiff's agent that he had bought



a billiard-saloon, and was going to put the third person in to run the place; that the latter would want some liquors and he wished some might be sent, and ordered the liquors; that the third person in fact ran the place and appeared to do all the business there; there was also evidence, admitted under the defendant's exception, that afterwards the third person told the agent that the defendant had given authority to buy stock for the saloon, and asked the agent to write at once to the plaintiff to hurry up the liquors previously ordered; that the agent thereupon wrote a letter containing a copy of the order which he had previously received from the defendant, in which the defendant's name appeared as the person ordering the goods, and the letter was produced and admitted in evidence, although it had not been read by the third person. *Held*, that there was sufficient evidence that the third person was the agent of the defendant, and that the letter was admissible in evidence. *Lozier v. Crofts*, 123 Mass. 480.

34. Persons who deal with an agent before notice of the recall of his powers are not affected by the recall. *Hatch v. Coddington*, 95 U. S. 48.

35. B., a broker, advised A. to sell certain unregistered bonds and buy certain other bonds. A. in reply, by letter, said, "I am most anxious to get my money in registered bonds," authorized B. to sell the bonds then held by B. for him, "and invest the amount in the best paying and surest bonds that you know of." "As these bonds are all I possess, I am naturally always anxious about them, for the reason that, if lost or stolen, I could recover nothing. You will please invest the results of the sale in the I. bonds (the ones recommended), or any sure road." "I want registered bonds of which I will have no trouble in drawing the interest." "I shall be under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates." It was agreed that the bonds referred to by B. were first-mortgage bonds. B. in fact bought some first-mortgage and some second-mortgage bonds, all of which were unregistered. *Held*, that, if he acted in good faith, it was within the scope of the authority conferred upon him by the letter of A. *Matthews v. Fuller*, 123 Mass. 446.

36. Agent will not in equity be permitted to profit by his negligence toward his principal. *Mitchell v. Aten*, 37 Kan. 33.

37. Where the authority of the agent is left to be inferred by the public from powers usually exercised by the agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject-matter. *Merchants' Bank v. State Bank*, 10 Wall. U. S. 604.

38. Thus, if in the case of a bank having power by its charter to buy and sell exchange coin and bullion, its cashier has habitually, with the knowledge of the bank, dealt with the public as authorized to buy and sell exchange, then the power to buy and sell coin also (the right to do both being conferred by the same clause of the charter), may be inferred by a jury. *Ibid*.

39. The act of an unauthorized agent only becomes the act of the principal after ratification upon full knowledge, so far as the intervening rights of third persons are concerned. *Schnepel v. Mellen*, 3 Mont. 118.



40. One cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency, and receiving commissions from both. Whether such double agency, even with consent of both principals, is consistent with public policy, is not here decided. *Meyer, et al. v. Hanchett*, 43 Wis. 246.

41. A principal who employs an agent to do a legal thing, is not liable in damages for any illegal act of the agent done in the execution of the mandate, to which the principal was not accessory, or privy. *Andreas Richoux v. Mayer Bros.*, 29 La. 828.

42. It is a general rule, of almost universal application that, where a person acts by an agent, the act is his, and not that of the agent. Where the agent does not disclose the name of his principal in making a contract, the other party may, when he learns it, hold him responsible for its performance, and the principal may, on showing the agency, claim and enforce the contract, precisely as if entered into by himself. *Baher v. Garvey*, 83 Ill. 184.

43. The admission of the alleged agent that he is authorized to represent a third person in a suit, does not prove the agency. The authority to represent a defendant in a suit must be shown expressly, or by irresistible implication. *Mrs. Marie E. Dawson v. Marie Landreaux*, 29 La. 363.

44. The principal is bound by any contract made by his agent which is necessary to carry out the objects of the agency; and no confidential limitation of the mandate can operate to the prejudice of any innocent third person. *E. H. Farrar v. Stephen Duncan*, 29 La. 126.

45. Where an agent has fraudulently sold his principal's property, and embezzled its proceeds, and the principal afterward accepts from the agent something in compensation for the embezzled proceeds, he thereby ratifies the sale made by the agent, and estops himself from any recourse against the innocent purchaser of his property. *R. N. Ogden v. A. Marchoud*, 29 La. 61.

46. An action cannot be maintained against an agent on a contract executed by him in behalf of his principal, unless it contains apt words to charge him personally, even though he acts without authority or in excess of authority; but he may become personally liable on a contract containing apt words to bind him, and then the words descriptive of his agency will be rejected as surplusage. *Hancock v. Yunker, et al.*, 83 Ill. 208.

47. Where a principal has dealt with a merchant through an agent acting under a written power of attorney, the merchant may prove by parol the correctness of his account, and any acknowledgment of its correctness, or any ratification of it by the principal, even if the agent has transgressed his mandate, or there are charges in the account which could not be legally enforced. Ratification by the principal of the unauthorized acts of an agent makes those acts binding on the principal. A power of attorney sufficiently comprehensive to authorize the agent to manage a plantation, and disburse the proceeds of its crops, will justify the factor who sells the crops to pay out their proceeds on the orders of the agent. *G. W. Sentell & Co., in liquidation v. Mrs. M. G. Kennedy and Husband*, 29 La. 679.

48. The good faith of the agent does not exonerate him from liabil-



ity to his principal, if he has been in fact negligent, or has disregarded orders. *Bank of Owensboro v. Western Bank*, 13 Bush, Ky. 526.

49. A member of a copartnership, after the dissolution, has no agency growing out of the former partnership relation to create or to perpetuate a liability of his late copartner for partnership indebtedness, as against the operation of the statute of limitations. *Tate v. Clements*, 16 Fla. 339.

50. Where bonds are delivered to an attorney-at-law and business agent, not a dealer in bonds, for the purpose that he should collect the amount thereof from the county in money or new bonds, or in both, but, in violation of his duty, he sells said bonds to a third person, such sale is void. *Hannon v. Houston*, 18 Kan. 561.

51. An agent of an undisclosed principal may be treated as the principal. *Welch v. Goodwin*, 123 Mass. 71.

52. Authority by a principal to an agent to invest his money, and look after his business generally, will not enable the agent to sell his principal's property, even such as may be acquired as the result of the investment. *Smith, et al. v. Stephenson, et al.*, 45 Iowa, 645.

53. Notice to an agent bound in the discharge of his duty to act upon it and to communicate it to his principal, is notice to the principal. *Philadelphia v. Lockhardt*, 73 Pa. 211.

54. A railroad corporation conferred upon its president, by a by-law, authority to act as "business and financial agent" of the corporation. Thereafter such officer executed, under the corporate seal, a mortgage upon a locomotive belonging to the corporation, to secure a debt of the corporation. Held, that the authority of the president was confined to the ordinary business of the corporation; that the execution of the mortgage was without the scope of his authority, and that such mortgage was not a lien upon the property in question. *Luse v. Isthmus Transit Railway Co.*, 6 Or. 125.

55. The general rule is that the clerks of an agent are not agents of the principal. *Hope v. Dixon*, 22 Grant's Ch., Ontario, 439.

56. Payments received by one knowing the agent to be unauthorized to make them, may be recovered by the principal as money wrongfully had and received. *Demarest v. Inhabitants of New Barbadoes*, 40 N. J. Law, 604.

57. Where the acts of the agent will bind the principal, where his representations, declarations and admissions respecting the subject matter will bind the principal, when made at the same time and constituting a part of the *res gestæ*. *Coyle v. B. & O. R. R. Co.*, 11 W. Va. 94.

58. An agent having special authority to adjust a particular loss cannot, by virtue thereof, adjust a different loss, and whatever he may do with reference to the different loss cannot affect the principal. To find the principal, it must be shown by competent evidence that the agent acted within the scope of his authority. *Hartford Fire Ins. Co. v. Smith, et al.*, 3 Colo. 422.

59. The employment of an agent by the principal to sell land need not be in writing, but the agent may recover for services rendered in effecting the sale, by virtue of a verbal contract. *Watson v. Brightwell*, 60 Ga. 212.

60. Money borrowed by the agent on the credit of the principal,



without authority, goes into the principal's business without the latter's knowledge, and the principal has the benefit thereof, yet is not the principal liable therefor to the person of whom it was borrowed, in the absence of a promise to pay. *Spooner v. Thompson and wife*, 48 Vt. 259.

61. Authority to make a contract for another is not sufficient to authorize its cancellation or surrender. *Stillwell v. Mut. Ins. Co.*, 72 N. Y. App. 385; also, *Duryee v. Lester*, 75 N. Y. 442.

62. One who constitutes another his agent, with full power to manage his mercantile house and to do all acts appertaining to his business, makes himself liable for the value of all goods purchased by the agent in the line of that business. *Schmidt and Zeigler v. Sandal, et al.*, 30 La. 353.

63. Held that the general agent in Canada of a foreign company must be regarded in the same light as the general agent at the head office in the foreign country. *Campbell v. National Life Ins. Co.*, 24 Upper Canada Com. Pleas Rpts. 133.

64. Notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit. Such knowledge of the agent is imputed to the principal third party who has dealt with the agent in good faith. *Stanly v. Chamberlin*, 39 N. J. Law, 565.

65. A principal is always bound by the acts and neglects of his agent. And the same rule which applies to a private principal applies to a corporation, whether ordinary or municipal, and, *a fortiori*, to a corporation which can only act by an agent. *City of Petersburg v. Appelgarth's Adm'r*, 28 Gratt. Va. 321.

66. An agent's authority, not coupled with an interest, being revocable at the pleasure of the principal, one dealing with such agent after notice of revocation, does so at his peril. *Patton v. Coen & Ten Broeke*, 3 Colo. 265.

67. The declarations of one acting as the agent of both parties to a contract, if made within the scope of his authority, are properly receivable in evidence in an action between the parties to the contract. *Schaefer, et al. v. Gildea, et al.*, 3 Colo. 15.

68. If the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner, and payment of the purchase price to him will be a defence to an action by the owner for the amount. *The Eclipse Windmill Co. v. Thorron*, 46 Iowa, 181.

69. Where an agent, clothed with power to accept bills, has accepted a bill in the name of his principal, the latter cannot escape liability as acceptor on the ground that he had no interest in the transaction in which the bill was given, and that he had received no consideration, unless he proves that his agent, to the knowledge of the holder of the bill, has abused his power. *Broadway Savings Bank of St. Louis v. Edward Vorster, et al.*, 30 La. 587.

70. In an action for goods sold and delivered the defence is payment to an agent, the fact that the principal has previously revoked the authority of the agent is not conclusive of plaintiff's right to recover, if the revocation of authority has not been communicated to

the defendant, and there is other evidence in the case from which the jury would be authorized in finding that the defendant had reason to suppose that the authority of the agent to receive payment continued. *Parker v. Hinckley Locomotive Works*, 122 Mass. 484.

71. One who purchases goods at half their value, he having information from which he may know that the factor with whom he deals is acting without authority, and in fraud of his principal, takes no title thereto, such a purchase being inconsistent with good faith, and void, and the principal may recover the goods from such pretended vendee. *Singer Manufacturing Co. v. Hudson*, 4 Mo. App. 145.

72. Where one, without consideration, entrusted an agent with a sum of money to settle a lawsuit between two others, she has the power of revocation until the settlement is complete, especially if the contract be in writing, and it is therein expressly agreed that the terms of the settlement are to be satisfactory to her in every way, and if not, then the money to be restored to her. *Phillips, et al. v. Howell*, 60 Ga. 411.

73. Where a party, acting through an agent, loans money on the security of the borrower's mortgage, and the agent, who keeps the note in his possession, pays over from time to time to his principal the accruing interest and parts of the principal of the note received from the maker, finally pays over to the principal the balance due on the note, without stating that he is paying his own money, and without obtaining the consent of his principal to buy, or even intimating that he desired to buy the note, he will not acquire any title to the note; and the note itself, and the accompanying mortgage, will be deemed extinguished. *Albert G. Brice v. John A. Watkins, et al.*, 30 La. 21.

74. Where an agency is continuous and made up of a long series of transactions of the same general character, knowledge acquired by the agent in one or more of the transactions is notice to the agent and the principal, which will affect the latter in any other transaction in which the agent, as such, is engaged and in which the knowledge is material. *Holden v. N. Y. and Erie Bank*, 72 N. Y. App. 286.

75. An agent employed in negotiating the sale of a promissory note, making statements regarding the purpose for which the same was executed, such statements will be considered fairly within the scope of his agency and will bind his principal; the general power to negotiate will, by implication, include the power to give such information as would ordinarily be called for. *McBean v. Fox, et al.*, 1 Bradwell's Ill. App. 177.

76. An agent for the sale of goods, with an interest in the proceeds, is not deprived of the power to sell by the death of the principal. The terms of the agency were that the agent should sell the goods and out of the proceeds pay certain lien and other claims, and apply the balance, first, to the payment of certain notes he held against the principal and return the overplus to the principal. *Held*, that the power was not extinguished by the death of the principal, that the agent had a right to sell, and apply the proceeds as agreed; and to pay his own notes in full, even though the estate was rendered insolvent and other creditors received only a percentage. In this case the notes were delivered by the defendant to the plaintiff, and by her presented to the commissioners. *Held*, that their allowance by the



commissioners as a claim against the estate, without the procurement or authority of the defendant, in no way affected his rights. *Merry, adm'r'x of Patterson v. Lynch*, 68 Me. 94.

77. A formal instrument, delegating powers, is ordinarily subject to a strict interpretation, and the authority is not extended beyond that given in terms, or which is necessary to carry into effect that which is expressly given. *Craighead v. Peterson*, 72 N. Y. 279.

78. An assignee or trustee cannot speculate with assigned property, save at his own risk. Neither can he engage in business ventures at remote places, and of doubtful results, without rendering himself personally liable for any untoward results. *Stettauer v. Carney*, 20 Kan. 489.

79. W. was the owner (subject to a mortgage) of property which M. wished to buy; R. becoming aware of this, entered into friendly negotiations with both, and bargained with W. to take \$3,500, and with M. to give \$5,600 for the property; R. concealed this difference from the parties. W. conveyed to M.; on her signing the deed, R.'s attorney paid to her the \$3,500 (less the mortgage debt), and on the deed being delivered to M., she (M.) paid to R.'s attorney the \$5,600. The facts afterwards coming to the knowledge of W., she filed a bill against R., claiming the balance of the \$5,600; and it appearing that in the negotiations he had given W. to understand that he was acting in her interest and had no personal interest of his own, the plaintiff was held entitled to a decree against R. for such balance with interest and costs. There may be an agency, and its duties and liabilities, without express words of appointment or acceptance; and where a party in negotiating between two persons, the one desiring to sell, the other to buy certain land, gave the former to understand that he was acting in her interest, it was held that she was entitled to the full price which he obtained for the land, though it exceeded the amount which he had obtained her consent to accept. In such a case, there being a conflict as to what had passed in the conversations, and no other witness of them being produced, it was held that, all other things being equal, the version of the deceived party should be accepted in preference to that of the other party. *Wright v. Rankin*, 18 Grant's Ch., Ontario 625.

80. The owner, by delivery of an unendorsed promissory note payable to another, delivered the same for collection to an agent, who, without the knowledge or consent of the owner, delivered the same for collection to a third person, who received knowledge of the rights of such owner. On the trial of an action by such owner against such third person to recover the money so collected by the defendant, wherein the complaint alleged a demand and refusal, the evidence established that the plaintiff, being the owner, by delivery, of an unendorsed promissory note payable to another, delivered the same to an agent for collection; that such agent, without the plaintiff's knowledge or consent, delivered the same for collection to the defendant, without informing him as to the plaintiff's ownership thereof; that the defendant received and collected the same and used the proceeds, believing it to be the property of the payee; and that another agent of the plaintiff, without informing the defendant of his agency or of the plaintiff's rights, demanded of the defendant a settlement. *Held*, that the plain-

tiff, by suing the defendant, ratified the act of her agent in placing such note in the defendant's hands. *Held*, also, that a demand was necessary, and that a finding that none was properly made will not be disturbed where the evidence in relation thereto is conflicting. *Held*, also, that under the averment of the complaint, that demand had been made and refused, evidence of a conversion by the defendant could not be given as an excuse for making no demand. *Kyser v. Wells*, 60 Ind. 261.

81. A., who had purchased the bankrupt stock in trade of B., made an agreement with him in writing by which B. was "to do business" at the same shop, as "agent for" A., authorizing B. "to sell the goods now in stock and buy other goods, in order to keep the stock good with the money received, but not to buy on credit without an order in writing" from A., and providing that "if at any time the business is not carried on to the satisfaction" of A., "the store and fixtures, together with all the goods in the store and the books and accounts, shall be turned over, with the keys of the store, to the said" A. B., without an order in writing from A., purchased certain goods on credit of the plaintiff, who was in ignorance of B.'s relation to A., all of which goods went into the stock of the store, to the use and benefit of A. Soon after, A. took possession of all the goods in the shop, including such of those sold by the plaintiff as remained in the stock, and sold them as his own. *Held*, in an action against A. to recover for the goods sold by the plaintiff to B., that the agreement made B. the agent of A. to carry on the shop; that A., by taking and selling a part of the goods, had ratified the act of B. in purchasing on credit without his order; and that the action would lie. *Surtwell v. Frost*, 122 Mass. 184.

82. Defendant executed a power of attorney as follows: "To whom it may concern: This is to certify that I hereby authorize H. Loveland, as my agent, to make drafts on me, from time to time, as may be necessary for the purchase of lumber for my account, and to consign the same to the care of P. W. Scribner & Co., Whitehall, N. Y.—A. H. Griswold." *Held*, we think the authority was absolute. The words, "as my agent" do not refer to the form of the contract, but to the capacity in which Loveland acted. If he drew, in fact, as agent, it was not material whether he described himself as such or not; nor was it made material by the power of attorney. So the words "as may be necessary" are not words of condition, but mean to the extent necessary, and the words "for the purchase of lumber," etc., refer to the business in which the agent is employed, and do not constitute a condition precedent, which a party taking the paper upon the faith of the authority must show has been performed. *Merchants' Bank of Canada v. Griswold*, 72 N. Y. 472.

83. There is a distinction, I think, between a conditional authority to draw and a limitation of authority. In the former case the power cannot be exercised at all without showing the performance of the condition; while in the latter it may be exercised, within the limits prescribed, in all the cases where the authority was limited in amount, time and otherwise. (*Barney v. Worthington*, 37 N. Y. 112.) In such cases the authority is absolute to draw, within the limit prescribed. In this case the power cannot be said to be general and un-



limited. It is restricted to the amount necessary to purchase lumber for the defendant, but within that limit is absolute and unqualified. The agent must determine the necessity of the amount required for the business in which he is engaged, and not the person who parts with his money on the faith of the authority. It was proved on the trial that the money was loaned to be used in that business. The agent, by procuring the discount upon the faith of the power of attorney, represented that it was to be used in the business of the defendant, and that the amount was necessary. *Ibid.*

84. As was said in *North River Bank v. Aymer* (3 Hill, 267), "The plaintiffs were apprised that Jacob D. Thurber had power to make and endorse notes in the business of the testator, and notes actually made and endorsed by the attorney and purporting to have been so made and endorsed, in conformity with the power, were presented to, and in effect discounted by the plaintiffs. This act was equivalent to an express declaration that the notes were made and endorsed in the business of the testator," and the court held that the principal was bound by these representations. The rule was authoritatively formulated by this court in the Schuyler case (34 N. Y. 30), as follows: "Where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, the principal is bound by the representations of the agent, although false as to the existence of such fact."

85. The question then recurs, whether the defendant promised, unconditionally, to accept the drafts. Without elaborating that question, I think it must be regarded as settled in this State that an absolute authority to draw is equivalent to an unconditional promise to pay the draft. (37 N. Y. 112 *supra*. *Ulster Co. Bank v. McFarlan*, 5 Hill, 433, 3 Den. 553; *Bank of Michigan v. Ely*, 17 Wend. 510.) And this is the natural and necessary implication. *Ibid.*

86. The declarations and representations of the agent at the time the draft was discounted are part of the *res gestæ*, and were admissible. (3 Hill, 267).

87. In *Lanusse v. Baker*, 3 Wheat. 146, the rule is concisely stated as follows: "When a general authority is given to draw bills from a certain place on account of advances there made, the undertaking is to replace the money at that place." The same principle was reiterated in 6 Peters, 685, and was sanctioned in *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 293; see, also, 5 Ch. and Finn 1. The authority in this case was to draw anywhere, and therefore it was an authority to draw in Canada, and the laws of Canada must govern. *Ibid.*

88. Power of attorney, authorizing an agent to sue for a specific debt, and to do all in the premises that the principal could do, carries with it the power to make the suit effective by attachment. *De Poret v. Gusman*, 30 La. 930.

89. If a principal constitute an agent to do business which obviously or reasonably cannot be done by the agent except through a sub-agent; or if there is, in relation to that business, a known and established usage of substitution, in either case the principal would be held to have expected and authorized such substitution. *Planters' and Farmers' Nat. Bank v. First Nat. Bank of Wilmington*, 75 Ind. 534.

90. As *ex gr.* the cashier of a bank, when made consignee of goods

under a bill of lading, may libel vessels for their non-delivery. *The Thames*, 14 Wall. U. S. 98.

91. Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects, as if the principal were the actor and the speaker. *Cliquot's Champagne*, 3 Wall. U. S. 114.

92. An agent may not act as such in a transaction where he has an interest or employment adverse to his principal. *Murray v. Beard*, 102 N. Y. 505.

93. An agent employed for an indefinite period may be discharged at any time. *Boogher v. Maryland Life Ins. Co.*, 8 Mo. App. 533.

94. Where an agent, acting within the scope of his authority, converts property of a third party to his own use, the principal is liable, though he never authorized or ratified the wrong. *Veitinger v. Winkler*, 8 Mo. App. 562.

95. The state has such a title or interest in a draft endorsed to the State Treasurer and delivered into his office by a County Treasurer for payment of taxes due the state, that an action may be maintained in the name of the people for a conversion thereof. A clerk in the office of the State Treasurer without authority endorsed a number of such drafts and negotiated them. Defendant took them from the endorsees, collected the money from and surrendered them to the drawees. *Held*, that defendant was liable to the state for a conversion of the drafts; that it could not claim an exemption on the ground that it took them in good faith solely as agent and in the course of a public employment.

96. It seems that the State Treasurer may delegate the power to endorse such drafts to a clerk in his office; it is not an act involving the exercise of judgment or discretion and it is not one of the official duties presented by statute which must be performed by the Treasurer in person. Also *held*, that the state was not estopped by a finding that the treasurer might by ordinary care, have discovered and prevented the fraudulent acts of the clerk in endorsing and diverting the drafts. Two drafts which came into the treasurer's office in the same manner as the other were endorsed in blank by the deputy treasurer who had authority, and were delivered to the clerk for deposit in one of the legally designated deposit banks. The clerk filled up the blanks in the endorsement with the name of the cashier of a firm of private bankers and delivered them to that firm, defendant took and collected them. *Held*, that defendant was not liable for conversion of them; that the drafts were not received and were not to be regarded as money in the hands of the treasurer, and he was not bound to place them in the deposit banks but could collect them in any manner he chose; and that therefore the fact that they were in the hands of private bankers was not such notice to defendant that they had been wrongfully diverted as to charge it with bad faith in dealing with them. *People v. Bank of North America*, 15 N. Y. 547.

97. Without special authority, an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent. *Ibid*.



98. The value of goods sold by a commission merchant contrary to instructions of his principal may be recovered under the common count for goods sold and delivered. *Woodward v. Suydam*, 11 Ohio, 361; *Newman v. McGregor*, 5 Ohio, 349; 7 Johns, N. Y. 132; 12 Wend. N. Y. 38.

99. The agent is not bound to account to the principal until the time fixed by the terms of the agency or a demand by the principal. Commencement of suit is sufficient demand. *Leake v. Sutherland*, 25 Ark. 219. Powers of agent. *Anderson v. State*, 22 Ohio State, 305; *Fatman v. Leet*, 41 Ind. 135; *Butler v. Maples*, 9 Wall. 766.

100. The provision of the act of Congress exempting United States bonds, etc., from taxation, under state authority, is complied with by exempting the bonds as issued; and a deduction of their par value instead of their market value from the personal estate is proper. *People Exrel Ins. Co. v. Conirs*, 76 N. Y. 65.

101. Where a party to a negotiable instrument intrusts it to another for use as such with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument. *Angle v. Northwestern Mutual Life Ins. Co.*, 92 U. S. 330.

102. It is a principal of universal application, that an unauthorized material alteration of a written instrument renders it void. *Ibid.*

103. An agent or attorney, unless specially authorized, cannot bind his principal by a submission to arbitration. *McPherson v. Cox*, 86 N. Y. 472.

104. Where a principal has executed and deposited with his agent negotiable obligations to be issued by the latter in certain contingencies which do not occur and the agent refuses to return them on demand, an action in equity may be maintained by the principal against the agent to compel a surrender of the obligations and for damages arising from the detention or in case a surrender cannot be made for the value of the instruments as valid obligations. *West R. R. Co. v. Bayne*, 75 N. Y. 1.

105. A simple contract, executed by an authorized agent in his own name, as agent, is binding upon his principal. *Hill v. Miller*, 76 N. Y. 32.

106. The government is not bound by the act or declaration of its agent, unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for it. *Whiteside, et al. v. United States*, 93 U. S. 247.

107. Individuals as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity. *Ibid.*

108. It is a well-established principal of law that an agent is required to have and to exercise a degree of skill and knowledge necessary to the proper performance of the duties he assumes or undertakes. If he has not the requisite skill or, having it, neglects to exercise it, he is responsible to his principal for the results of his ignorance or neglect.

*Dartnell v. Howard*, 4 B. and C. Eng. 345; also, *Denew v. Davenell*, 3 Camp. 451.

109. Where special instructions are given to an agent he is required to regard them in every particular. Where none are given, or where they are incomplete or indistinct, his duty will depend upon the understanding of the parties to be inferred from the circumstances of the undertaking, or the general usage or established customs in relation to such business. *Courrier v. Ritter*, 4 Wash. U. S. C. C. 549.

110. An agent cannot, in a general sense, delegate his authority to another, unless duly authorized by his superior so to do. And when without such authority he employs subagents in the performance of his assumed duty he can be held responsible to his principal for all damages caused by their incapacity or negligence. *Alexander v. Alexander*, 2 Ves. Eng. 643; also, *Lyon v. Jerome*, 26 Wend. N. Y. 485.

111. There are exceptions to this rule, as where from the very circumstances of the case it is known to be, and is necessary to employ subagents, as where the business is such that the agent cannot personally attend to it, the assent of the principal to the employment of subagents is implied. *Rossiter v. Trafalgar Life*, A. A. 27 Bear. Eng. 377.

112. The agent is of course required under these circumstances to use due diligence and circumspection in making his selection of capable subagents.

113. The bank must present all paper at the proper place for payment at maturity, and if payment is neglected or refused it must, if necessary, have such paper protested, and give notice as soon as possible, to the holder or depositor thereof alone, unless there be some general usage to the contrary where such paper is payable. *Bank of U. S. v. Goddard*, 5 Mas. U. S. 366; *State Bank of Troy v. Bank of the Capital*, 41 Barb. N. Y. 343; *Hayes v. Birks*, 3 Nos. and P. Eng. 699; *Phipps v. Milbury Bank*, 9 Metc. Mass. 79.

114. A contrary view has been held by other courts as follows: *Bank of Washington v. Triplett*, 1 Pet. 25; *Smedes v. Bank of Utica*, 20 Johns. N. Y. 372, 3 Cow. N. Y. 662; *West Branch Bank v. Fulmer*, 3 Barr. Eng. 299; *Fabens v. Mercantile Bank*, 23 Pick. Mass. 330; *McKinster v. Utica Bank*, 9 Wend. N. Y. 46, Wend. 473; *Thompson v. Bank of South Carolina*, 3 Hill, S. C. 77.

115. Where a bank receives a paper for collection, and which is payable at a distant locality, it has been held that the acceptance by the bank of paper for collection at some distant place implied, upon a reasonable construction, no other agreement than that it should be forwarded with due diligence to some competent agent to do what was necessary in the premises; that the person leaving the bill was aware that the bank could not personally attend to the collection, and must therefor send the bill to some distant agent, and must be assumed to have authorized the transmission that the foreign bank or notary was directly responsible to him for any default, since they became his agent for the collection, and that the bank first receiving the paper could not be reasonably regarded as responsible for the fidelity of the agent abroad. *Allen v. The Merchants' Bank*, 15 Wend. N. Y. 484. The above case was appealed to the court of errors, where the decision of the supreme court was reversed. 22 Wend. 215.



116. The case was thus finally appealed to the Senate, then (1839) the highest appellate court in the state of New York, where the decisions of the Supreme Court was reversed; this reversal has been respected by the courts of New York, with an exception, where the Supreme Court adhered to its previous decision. *Bank of New Orleans v. Smith*, 3 Hill, N. Y. 560.

117. The Court of Appeals, which is now the highest appellate court in the state of New York, has sustained the decision of the State Senate, and thus established the decision as the law within its jurisdiction. The court held that where a country bank sends to its corresponding bank in Albany, for collection, an indorsed bill of exchange payable in New York, and the latter bank indorses it and transmits it to its own corresponding bank in New York City for the purpose, the Albany bank alone is answerable for any negligence in presenting the bill by which the indorser fails to be charged. *Montgomery County Bank v. Albany City Bank*, 3 Seld. N. Y. 459.

118. "Where the Bank of Wilmington was the owner of a bill of exchange, payable at sight, at Troy, and indorsed and transmitted it to the plaintiff under an arrangement by which the latter collected and retained the proceeds of paper thus remitted to it, and with the same redeemed the circulating notes of and paid drafts drawn by the Bank of Wilmington, and the plaintiff indorsed and transmitted the bill to the defendant, its correspondent in New York, for collection and the same purpose," the court held the bill, if collected by the Troy City Bank, or if the same was lost by the omission of the latter to charge the drawer and indorsers. *Commercial Bank of Penn. v. Union Bank*, 1 Kern. N. Y. 203; *Walker v. Bank of N. Y.*, 5 Seld. N. Y. 382; *Hoard v. Garner*, 3 Sandf. N. Y. 179; *Downer v. Madison County Bank*, 6 Hill, N. Y. 648; *Reeves v. State Bank*, 8 Ohio St. 465; *American Express Co. v. Haire*, 21 Ind. 4; *Mackasy v. Ramsays*, 9 El. and Fin. Eng. 818; *Ayrault v. Pacific Bank*, 47 N. Y. 573; *Wart v. Woolley*, 3 Barn. and C. Eng. 439; *Thompson v. Bank of S. C.*, 3 Hill, S. C. 77.

119. The contrary has been decided by a Massachusetts court, wherein it was held that an action could not be maintained against the deposit bank. That when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is reasonably to transmit the same to a suitable bank or other agent at the place of payment. The defendants had performed their whole duty of the bank so receiving the note in the first instance is reasonably to transmit the same to a suitable bank or other agent at the place of payment. The defendants had performed their whole duty when they transmitted the note to a solvent bank in good standing, and were not responsible for the misfeasance or negligence of that bank. *Fabens v. The Mercantile Bank*, 23 Pick. Mass. 330; *Dorchester, &c., Bank v. New England Bank*, 1 Cush. Mass. 186; *Warren Bank v. Suffolk Bank*, 10 Cush. Mass. 582; *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152.

120. A similar case was decided in Connecticut in 1837. The owner of an accepted bill, payable in New York, indorsed and deposited it with the East Haddam Bank for collection. It was sent by the deposit bank, without its indorsement, to the Merchants' Ex. Bank

in New York; upon presentation and non-payment, the collecting bank sent notice to the drawer alone. The East Haddam Bank, supposing the bill had been paid, gave the amount it called for to the holder. Shortly after the bank discovered the error, and instituted suit for the recovery of the money from the bill owner. The court held that the bank was not precluded from recovering because of its not having indorsed the bill or advised the collecting bank of the holder's place of residence, or on the ground that it was responsible to the holder for the default of the collecting bank, or by reason of its having paid over the money to him. *East Haddam Bank v. Scoville*, 12 Conn. 303.

121. An Illinois court held that a bank receiving a bill or note for collection, where its transmission to another place is necessary, discharges its duty by sending it in due course and reason to a competent reliable agent, with proper instructions for its collection. *The Aetna Ins. Co. v. The Alton City Bank*, 25 Ills. 362.

122. A Wisconsin court held that the contract implied from the receipt by a bank, of a note for collection, payable at a distance from its place of business, is not absolutely to make due presentment of the note and give due notice of its non-payment, but to place it in the hands of some competent and responsible agent for that purpose; and that if the bank exercise reasonable care and skill in selecting such agent, it is not liable for his default. *Stacy v. Dane Co. Bank*, 12 Wis. 629.

123. In Mississippi, the court held that a bank receiving commercial paper for collection, discharges its duty in case of non-payment, by placing the paper reasonably in the hands of a notary public with proper instructions, and in such case the notary is the subagent of the owner, and directly responsible to him. *Bowling v. Arthur*, 34 Miss. 41.

124. The Maryland court held the same in *Citizen's Bank v. Howell*, 8 Md. 530. In Pennsylvania, the same in *Bellemue v. Bank of U. S.*, 4 Whart. 105; *Mechanics' Bank v. Carp*, 4 Rawle, Pa. 383; same in Louisiana, *Hyde v. Planters' Bank*, 17 La. 560.

125. The question of responsibility under these conflicting opinions has remained undecided for years, the courts of one state holding to one side, and those of another to the other. The supreme court of the United States has now settled the question. It has decided the case as follows: A creditor residing in Nebraska left a claim with a collecting agent for collection, the agency sent the claim to a law firm in Nebraska; the lawyers procured a judgment by confession against the debtor, well knowing that he was insolvent. The proceeds of his judgment were sent by them to the collecting agency, but not paid over to the creditor by the agency. In four months after this confession of judgment, proceedings were commenced in bankruptcy against the debtor in Nebraska, who was declared bankrupt. When his assignee in bankruptcy brought action against the New York creditor to recover back the amount of the judgment, the question of responsibility rested on the fact whether the lawyers who knew of the insolvency of the debtor at the time of the confession of judgment, were or were not the agents of the creditor. If they were, he must be liable, since the knowledge of the agent is the knowledge of the principal. The Supreme Court held that the attorneys employed were



the agents of the collection agents, which assumed the collection of the claim, and that, therefore, the assignee could not recover. *Hoover, assignee v. Wiese*, 13 Albany Law Journal, 164. The decision in New York, Ohio, and in England, which hold the bank receiving commercial paper for collection, are cited with approval and followed as authorities upon the question to be passed upon, although other cases were cited, including *Bradstreet v. Everson*, 72 Pa. St. 124; *Lewis v. Peck*, 10 Ala. 142; *Cobb v. Beake*, 6 Ad. and E. Eng. 930.

126. In the United States Circuit Court for the Northern District of Illinois, the above doctrine was held. The court held that the law, as now settled by the Supreme Court of the United States, in *Hoover v. Wiese, et al.*, 91, 308, is, that when a bank receives commercial paper for collection, whether payable at the place where such bank is situated, or at some distant place, in the absence of special agreement, there is an implied contract on the part of the bank, arising from the undertaking that it will take all steps necessary for the collection of the paper, and in case of non-payment, for charging the parties thereto—that is, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the agents of the owner of the note. Its duty is not confined simply to that of using care and diligence in the selection of its agents to perform the undertaking which it has accepted.

127. It is further responsible for the neglect and default of the corresponding bank, notary, or other agent employed by it or by its agents, and is liable to the holder for the money when the same is collected by any of its agents or subagents. *Hyde v. First National Bank*, Chic. Leg. News, 262; Alb. L. J., 340.

128. But the other state courts before which the question has arisen, and the Supreme Court of the United States, hold to the doctrine stated above, *i. e.*, to the rule which governs a bank in the selection of a notary where the paper is payable in the place of the receiving bank, that the duty of the bank ceases with the selection of a proper notary. The reasoning is this: when a party deposits his paper in his own bank for collection, which paper is made payable at a distant place, he knows or is bound to know, that the receiving bank, in order to do its duty in collecting, has to transmit the paper to its correspondent at or nearest the place where the paper is payable, in order that the same may be duly presented for payment, and if not paid, due demand and notice can be given; for it cannot be supposed that the receiving bank would send its own agent or notary to the distant place, perhaps thousands of miles, to present the paper for payment, and if not paid to duly protest it. And it entered into the implied contract, made with the receiving bank at the time, that it should transmit the paper to its correspondent nearest to the place where the paper is made payable; that when the receiving bank so transmits the paper, the correspondent bank or its notary becomes the agent, not of the transmitting bank, but of the true owner of the paper, and is responsible to him for its neglects or defaults.

129. Of course the receiving bank must not be guilty of any negligence in selecting an improper bank to which to transmit the paper. Some of the leading cases that hold this doctrine are—*Dorchester and Milton Bank v. New England Bank*, 1 Cush. Mass. 177; *Lawrence v.*

*Stonington Bank*, 6 Conn. 521; *Ætna Ins. Co. v. Alton City Bank*, 25 Ills. 243; *Bank of Washington v. Triplett*, 1 Peters, U. S. 25; decision by Chief Justice Marshall.

130. And Mr. Morse, in his treatise, after going fully into the doctrine, comes to the same conclusion.

131. Checks drawn on another bank located in the same place as the deposit bank, and deposited for collection, must be presented for payment before the close of banking hours, on the business day next succeeding that upon which they are deposited, unless otherwise duly instructed. *Alexander v. Burchfield*, 7 Mass. and G. 1,061; *Boddington v. Schlencker*, 4 B. and Ad. Eng. 752; *Moule v. Brown*, 4 Bing. Eng. 266.

132. The depositor of paper has no legal right to draw on the bank of deposit for collection before the payment for the same has been received by the deposit bank, although it is customary with many banks to allow it to be done. *Scott v. Ocean Bank*, 23 N. Y. 13.

133. The bank having placed the amount due on the note deposited for collection, does not deprive the depositor of his ownership of such note. *Giles v. Perkins*, 9 East. Eng. 13.

134. Where the collection passes through several banks, each is bound to the holder for its failure to transmit to its next correspondent, and is liable to a suit direct from him. *Lawrence v. Stonington Bank*, 7 Conn. 521.

135. But this would not be the doctrine in New York or Ohio.

136. The ratification by one of the unauthorized act of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. *Cook v. Tullis*, 18 Wall. 332.

## AGREEMENTS.

137. Agreement which is forbidden by law, expressly, or by implication, or which is against public policy, will not be enforced in a court of law. Neither will an executed contract resting on such a consideration be relieved against in equity. *Ratcliffe v. Smith*, 13 Bush, Ky. 172.

138. The defendants promised to furnish to the plaintiffs sulphuric acid for their "works." Neither the terms of payment nor the time for which the arrangement should continue, was agreed upon. *Held*, that either side to the contract could terminate it at pleasure. *Cumb. Bone Co. v. Atwood Lead Co.*, 63 Me. 167.

139. When a debtor, upon whose obligation installments of interest which had from time to time become due remain unpaid, entered into an agreement to pay the said obligation with compound interest, the promise is met by the payment of simple interest upon the principal unpaid at the date of the agreement, and simple interest, also, upon the total arrears of interest at the time due and unpaid; it does not authorize the compounding of interest annually for the whole period, which interest has become due by the terms of the obligation. The mere rendering of an account does not make it an account stated,



and an omission to object to it raises only a presumption of assent, which may be rebutted by circumstances tending to a contrary inference. *Toland v. Sprague*, 12 Pet. 330; *Guernsey, et al. v. Rexford*, *Adm. Applt.*, 18 Sickels, N. Y. 631.

140. A parol promise to pay the balance of purchase money due under articles of agreement, made at the time of the execution of a deed, is founded on a good consideration and will support a personal action for said debt. *Baum v. Tonkin*, 110 Pa. 569; *Scott v. Fields*, 7 Watts, Pa. 360; *Clarke v. Stanley*, 10 Barr. Pa. 479.

141. A creditor of a firm cannot maintain an action upon an agreement made with the firm by one not a member, to pay a portion—for instance, one quarter—of its indebtedness; as no one creditor can show from the contract that it was intended for his benefit or covers any part of his debt. *Wheat. v. Rice*, 97 N. Y. 296.

142. Agreement of life insurance company to pay agent commissions on renewals, or a gross sum in lieu thereof, is terminated by dissolution of company. *Hepburn v. Montgomery*, 97 N. Y. 617.

### ALTERATION OF INSTRUMENT.

143. If an instrument be materially altered after its execution, no money can be had upon it unless it was accidental, or done by the party claiming under it, or with his consent. An alteration after delivery, and whilst in the custody of the party asserting a right under it, devolves upon him the duty of explanation. *Everman & Co. v. Robb*, 52 Miss. 653.

144. In an action upon a promissory note, the answer admitted the making of a note for the amount, and payable at the time of the note set forth in the complaint, but averred that said note, after its delivery to plaintiff, was materially altered by him, without defendant's knowledge or consent, by changing the date thereof from April 1, 1872, to April 1, 1873. This answer was struck out, on motion, as sham and frivolous. *Held* error; that the alteration alleged was material; also, that it was not the province of the court to decide the question of fact raised by the answer, upon mere inspection of the note. *Rogers v. Vosburgh*, 87 N. Y. 228.

145. Any alteration of a note by the holder unknown to the maker destroys all interest of the person so altering the note in the same, and makes him responsible for the amount due on the note to all innocent holders. The insertion of "with interest," or otherwise increase the value of the note would be forgery. *Ed.*

146. When a partnership is in the habit of indorsing negotiable paper, having blanks left for the date, and gives the paper so indorsed to a person to use—he to fill the blank when he wishes to use it—the firm is liable on the paper with the date filled in, when, thus complete, it is held by innocent *bona fide* holders for value. *Michigan Bank v. Eldred*, 9 Wall. U. S. 544.

147. Evidence that by the articles of partnership one partner had no right to indorse negotiable paper, is inadmissible to defeat a *bona fide* holder of such paper indorsed with the firm name by a member of

the firm, and taken by such *bona fide* holder for value, and without notice of the articles. *Ibid.*

148. The power to fill the blanks for dates implies in favor of such holders a power in the person trusted, to change the date, after a note has been written, and before it is negotiated. *Ibid.*

### AMENDMENT.

149. Of complaint, after judgment and satisfaction, by adding new cause of action, is in the discretion of the court. *Hatch v. Cent. Nat. Bank*, 78 N. Y. 487.

150. Upon the trial of an action upon a contract, defendant moved and was permitted, without objection, to amend his answer by setting up an overpayment upon the contract, and demanding judgment for the amount thereof. It was proved that said overpayment was made after the commencement of the action. *Held*, that defendant was entitled to judgment for the amount of such overpayment; that under the Code of Procedure (§ 150, sub. 1, which was in force at the time of the trial), as it was a claim arising out of the contract upon which the action was brought, it was a proper counter claim; that defendant might have been allowed to set it up by supplemental answer (§ 177); that the amendment was in effect a supplemental answer, and gave the same right to judgment. *Howard v. Johnston*, 82 N. Y. 271.

### APPEAL.

151. A trustee of a fund for the security of an indebtedness to others, who as such is plaintiff in an action to enforce such indebtedness, may appeal from a judgment which reduces and limits the number of those who are creditors upon the fund; he is aggrieved by the judgment when a real claim is not added into the amount adjudged to be due; and a real claimant is shut out by it from a share in the proceeds. *Bockes v. Hathorn*, 78 N. Y. 222.

152. After the satisfaction of a judgment in favor of plaintiff it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided. *Hatch v. Cent. Nat. Bank*, 78 N. Y. 487.

153. When the lien of a judgment upon real estate of the judgment debtor has been suspended during appeal by order of the court as prescribed by the Code of Civil Procedure (§ 1256), an order vacating such order of suspension and upon its face purporting to restore the lien *nunc pro tunc* does not restore it as against a creditor whose judgment was docketed in the interval between the granting of the two orders, and who was not a party to the original action or to the proceeding vacating the order. The court cannot by the mere process of



vacating its order destroy liens taken upon the faith of it. *Harmon v. Hope*, 87 N. Y. 10.

154. When the gravamen of an action as set forth in the complaint is fraud and the action is tried upon that theory without objection or exception, and the judgment is adverse to the plaintiff, the question as to whether the complaint stated facts sufficient to constitute a cause of action on contract, and whether there was evidence sufficient on the trial to sustain such a cause of action cannot be considered on appeal to this court. *Salisbury v. Howe*, 87 N. Y. 128.

155. A question not presented on trial cannot be heard here. *Salisbury v. Howe*, 87 N. Y. 128.

156. It seems that in an action in the nature of a creditor's suit, the amount of the judgment upon which it is based measures the matter in controversy, and if less than \$500, the judgment in the creditor's suit is not appealable to this court unless an appeal is allowed by the Supreme Court. (Code, § 191, sub. 3). *Payne v. Becker*, 87 N. Y. 153.

157. An injunction order having been issued in this action, restraining defendant, its officers, etc., from doing certain acts, an order was subsequently granted, directing that an attachment as for contempt issue against G., its president, returnable at Special Term, at a day named. *Held*, that the order affected no substantial right of defendant; and, therefore, was not reviewable upon appeal by it to this court. *A. & P. Tel. Co. v. B. & O. R. R. Co.*, 87 N. Y. 355.

158. It is no defence to an action on an undertaking given to stay execution under the Code of Procedure (§ 355), by executors on appeal from judgment against them as such, that sufficient assets, did not come to the hands of the executors to pay the judgment. *Yates v. Burch*, 87 N. Y. 409.

159. Under the provision of said Code (§ 348) requiring ten days' notice to "the adverse party of the entry of the order or judgment affirming the judgment appealed from," before bringing suit upon an undertaking given to stay proceedings on appeal to the General Term, the fact that after entry of judgment and service of notice thereof, the sum of costs was reduced upon retaxation, did not require the service of a new notice before bringing suit. *Yates v. Burch*, 87 N. Y. 409.

160. Where, after the commencement of an action against a railroad corporation, the plaintiff executed a release of the cause of action and of the costs therein, and also signed, in person, a stipulation discontinuing the action, and consenting to the entry of an order of discontinuance on filing the stipulation, which order was entered, ex parte and without the special direction of the court, upon filing the release and stipulation, *held*, that while the court had power to protect the plaintiff's attorney against a collusive settlement in fraud of his rights, the plaintiff was not entitled to have the order set aside on account of her attorney; that the order, having been entered upon her stipulation expressly authorizing it, she could not question its regularity and could not be heard to make the objection that, having appeared by attorney, he only was authorized to sign a stipulation for discontinuance; and that therefore an appeal by her

from an order denying a motion to set aside an order of discontinuance was not sustainable. *McBratney v. R. W. & O. R. R. Co.*, 87 N. Y. 467.

161. C., an attorney, on the employment of a lunatic over whose person and estate a committee had been appointed, and by permission of the court, made an application to supersede the commission, which was denied. C. then applied to the court for his charges and disbursements. A portion of his claim was allowed, and an order granted directing its payment. The committee appealed to the General Term, and on January 15th, 1875, after argument but before decision, the lunatic died. On January 22d, the order was reversed and motion denied. The order of reversal was duly entered and served on C. February 25th, and on May 1st, he appealed to this court. In June, 1879, the General Term, by order, substituted "January 5th," for "January 22d," as the date of the order of reversal. C. caused the order, with its substituted date, to be reëntered on September 21st, 1881, and on September 26th, appealed therefrom. A motion was thereafter made by C. for an order substituting the administrators of the lunatic in the proceedings in place of the committee, who had also died. *Held*, first, that to make applicable the provisions of the Code of Civil Procedure in regard to appeals from orders where a party "has died since the making of an order" (§ 1297), it was necessary for the moving party to treat the order appealed from as made before the death of the lunatic, who alone could be regarded as "the adverse party;" that the service of the order under the original date was effectual to limit the time of appeal, and the time expired in sixty days thereafter; second, that the order itself was not appealable, as it was in the discretion of the court below; third, upon the death of the lunatic, the power and functions of the committee ceased, and the proceedings abated; any legal claims against the estate could thereafter only be enforced in the manner prescribed by law. *In re Becwith*, 87 N. Y. 503.

162. Under the Code of Civil Procedure (§ 1337), where the decree of a surrogate in proceedings for the probate of a will is affirmed by the General Term of the Supreme Court, this court has no jurisdiction, upon appeal, to review the questions of fact which depend upon conflicting evidence, but is confined exclusively to questions of law. *In re Ross*, 87 N. Y. 514.

163. It seems that, unless special provision authorizing it can be found in the law, there can be no review in this court of questions of fact, depending upon conflicting evidence, in any case. *In re Ross*, 87 N. Y. 514.

164. It seems, also, that the only special provision authorizing the review here of such questions of fact is that which provides for a review upon the facts, where the General Term has reversed, upon questions of fact, a judgment entered upon the report of a referee, or upon a decision of the court on trial without a jury. *In re Ross*, 87 N. Y. 514.

165. The provision of said Code relating to appeals from decrees of surrogates (§ 2586), providing that "where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact which the surrogate had," etc., applies exclusively to appeals to the Supreme Court. *In re Ross*, 87 N. Y. 514.



166. Where, in proceedings before a surrogate to prove a will, erroneous evidence is received, the decree will not be reversed "unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby." (Code, § 2545). *In re Ross*, 87 N. Y. 514.

167. Where a judgment entered upon the report of a referee is reversed by the General Term, and the order of reversal does not certify that it was founded upon error of fact, it is to be assumed on appeal to this court that the reversal was for some error of law. *Ward v. Craig*, 87 N. Y. 550.

168. The respondent, however, is entitled to sustain the reversal by showing any error of law which is fatal to the judgment, whether made the reason of the action of the General Term, or wholly unnoticed by it. *Ward v. Craig*, 87 N. Y. 550.

169. Where it does not appear in an order of General Term reversing a judgment entered upon the report of a referee, that the reversal was upon questions of fact, the only inquiry on appeal from the order to this court is whether it rests upon any error of law. (Code, § 1338). *Davis v. Leopold*, 87 N. Y. 620.

170. Under the Code of Civil Procedure (§ 1337), the decision of a surrogate upon a question of fact arising on conflicting evidence upon the final accounting of an executor is not reviewable here. *Davis v. Clark*, 87 N. Y. 623.

171. The provision of said Code (§ 2586), declaring that: "Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact which the surrogate had," etc., has reference only to appeals from surrogate's decrees or orders to the Supreme Court. *Davis v. Clark*, 87 N. Y. 623.

172. It is in the discretion of the court below, whether to set aside a subpoena *duces tecum*; so also, whether permission shall be granted defendant to inspect and copy plaintiff's books; and the exercise of this discretion is not reviewable here. *Clyde v. Rogers*, 87 N. Y. 625.

173. It seems, that the clause in section 1003 of the Code of Civil Procedure providing that an error in the admission or exclusion of evidence, etc., "upon the trial may, in the discretion of the court which reviews it, be disregarded if that court is of opinion that substantial justice does not require that a new trial should be granted," has no application to a trial before a referee. *Luders v. Rasmus*, 87 N. Y. 631.

174. When erroneous ruling evidently harmless, not ground for reversal. See *Nolan v. B. C. & N. R. R. Co.*, 87 N. Y. 63.

175. Costs of appeal when in discretion of General Term. See *In re Bradner*, 87 N. Y. 171.

176. When order allowing counsel fees in proceedings to ascertain damages by reason of injunction is reviewable here. See *Newton v. Russell*, 87 N. Y. 527.

177. On appeal to this court from a judgment entered on a decision of the court or the report of a referee, no fact can be considered for the purpose of reversing the judgment unless it is either stated in the findings, or was requested to be found on uncontroverted evidence. *Thomson v. Bank of British N. America*, 82 N. Y. 1.

178. This action was brought to recover back two items of moneys alleged to have been extorted from plaintiff without consideration and

wrongfully; the defences were a denial of the wrongful acts charged and averments that one of the items was paid for services rendered by a bank of which defendant was president, and that the payment was to said bank and not to defendant; as to the other item that it was a charitable donation to a church of which defendant was treasurer, and that both were paid voluntarily; evidence was given on the trial supporting the defence as to both items. Upon appeal from an order of General Term reversing a judgment in favor of plaintiff entered on the verdict of a jury and granting a new trial, *held*, that assuming the payments were made without consideration, and though voluntarily made could be recovered back (as to which quere), yet if the defendant was not guilty of the wrongs charged, and as to one of the items simply acted as agent of his bank in receiving the money, and the payment was in fact to the bank and went to its use (which facts it was conceded by appellant's counsel were to be assumed in favor of respondent), defendant was not personally liable for that item, but the action should have been against the bank; that at least as to so much of the recovery it was erroneous, and being wrong in part a new trial was proper. Appeal, therefore, dismissed. *American National Bank v. Wheelock*, 82 N. Y. 118.

179. Upon motion in an action of foreclosure by a junior mortgagor to be subrogated to the rights of the plaintiff upon payment of his mortgage, it was a question at issue, as to whether the junior mortgage was paid. *Held*, that the determination of the court below was conclusive upon appeal. *Twombly v. Cassidy*, 82 N. Y. 155.

180. An order of arrest is a provisional remedy which the court may grant or refuse in a proper case within its discretion, and the exercise of this discretion is not reviewable here. *Clarke v. Lourie*, 82 N. Y. 580.

181. No appeal lies, therefore, to this court, from an order vacating an order of arrest, when upon any view of the facts the decision can be upheld. *Clarke v. Lourie*, 82 N. Y. 580.

182. Unless the contrary appears in the order, it must be assumed that it was made in the exercise of such discretion. *Clarke v. Lourie*, 82 N. Y. 580.

183. The opinion of the court below cannot be resorted to for the purpose of determining the ground on which it was based. *Clarke v. Lourie*, 82 N. Y. 580.

184. The point that in action on lost note, bond required by statute was not given, cannot be raised for first time on appeal, it must be presented by exception. *Fordham v. Hendrickson*, (Mem.) 84 N. Y. 654.

#### APPLICATION OF PAYMENTS.

185. It seems, that the right of a debtor making a payment to direct upon which one of several distinct liabilities or demands, held by his creditor, it shall be applied, must be exercised at the time of payment; if he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the credi-



tor and he may apply it as he chooses. *Nat. Bank of N. v. Bigler*, 83 N. Y. 51.

186. So, where the debtor assigns property as collateral security generally without dictating upon what demand its proceeds shall be applied, he cannot bind the creditor by any subsequent direction, but the latter may apply such proceeds to any of the demands held by him which are due at the time the money is received. *Nat. Bank of N. v. Bigler*, 83 N. Y. 51.

187. Where money is collected by a creditor by the sale of collaterals placed in his hands to secure several distinct items of indebtedness, under such circumstances that neither he nor the debtor possesses the right to determine as to the application, the power devolves upon the court, and it will apply the money upon equitable principles. *Jones v. Benedict*, 83 N. Y. 79.

188. W. H. held certain notes and a mortgage as security for an indebtedness of W. F.; the latter was dealing with and was indebted also to F., B. & Co. To secure any balance which might, at any time, be due from W. F. to that firm, W. H. transferred to them said securities, the same to be returned to him when such balance was paid; afterward W. H. drew drafts upon F., B. & Co., for the benefit of a mining corporation, in which he had no interest, but in which W. F. and the plaintiff were stockholders, W. F. being its superintendent; these drafts were accepted by said firm upon an agreement that the notes and mortgages should be held as security therefor; and, not having been paid at maturity, were taken up by the firm. To procure an extension of the time of payment W. F. executed his notes, payable to his order, which were indorsed by him, by plaintiff and by other stockholders, and were delivered to F., B. & Co. The stockholders, including plaintiff and W. F., subsequently executed an agreement by which each obligated himself to pay his proportionate share of liabilities assumed for the benefit of the corporation. F., B. & Co., recovered judgment upon the stockholders' notes, and subsequently collected, upon the mortgage, a sum sufficient nearly to pay the balance due them from W. F. In an action brought for relief against said judgment, plaintiff claiming that the sum so collected should be applied *pro rata* upon the debts for which the mortgage was held as security, *held*, that whether the application of the money devolved upon the creditor or the court, equity justified its application upon the balance due from W. F. *Jones v. Benedict*, 83 N. Y. 79.

#### ASSESSMENT.

189. Under the provisions of the statute (1 R. S., 389, § 5) exempting agents of moneyed corporations or capitalists from taxation "for any moneys in their possession, or under their control, transmitted to them for the purposes of investment, or otherwise," and exempting demands belonging to non-residents of the State sent to or deposited in this State for collection (1 R. S., 419, § 3), foreign capital sent here for investment is protected from taxation, whether invested or uninvested, and whether the securities received therefor are taken

away or remain here for collection. *Williams v. Suprs. Wayne Co.*, 73 N. Y. 561.

190. Under the Internal Revenue act of July, 1870, interest paid and dividends declared during the last five months of the year 1870, taxable, as well as those declared during the year 1871. *Blake v. National Bank*, 23 Wall. U. S. 307.

### ASSIGNMENTS.

191. The statute provision that blank assignments shall be taken as of a date most to the advantage of the defendant, only applies in the absence of evidence as to the date of the assignment. *Trieber v. Com. Bank of St. Louis*, 31 Ark. 128.

192. The surety in a bond, upon tender of the debt, is entitled under the statute to an assignment of the bond, if demanded; and a refusal to make such assignment is a discharge of the surety, *per se*, irrespective of the question whether, in consequence of such refusal, the surety has sustained injury. *Merrikan v. Godwin, et al.*, 2 Del. 236.

193. An assignment under seal and duly recorded, of wages, by A. to "J. B., treasurer," to secure the corporation of which J. B. was treasurer, for goods it had previously sold and might afterwards sell to A., is valid. *Giles v. Ash*, 123 Mass. 353.

194. Although an assignment giving preferences is void under the bankrupt act, under the conditions therein provided, it is void only as to persons and proceedings under that act, and except as to such persons and proceedings, it is valid as ever. *Williams v. Pitts*, 55 Howard, N. Y. 331.

195. The assignee of stock in an insurance company, by assignment and delivery of the certificate of stock, and notice to the company, has a superior right to that of a subsequent attaching creditor of the assignor, although there be a valid by-law of the company, embodied in the certificate, that the stock is only transferable on the books of the company, at their office, on surrender of the certificate, the charter containing no provision on the subject of the assignment of the stock. *State Ins. Co. v. Gennett*, 2 Tenn. Eq. 100.

196. An assignment by virtue of or under a foreign law does not operate upon a debt, or rights of action as against a person in this State. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

197. At the time of the execution of an assignment for the benefit of creditors there was a balance standing to the credit of one of the assignors upon the books of another bank; this was not included in the inventory. It appeared that the assignment was executed and filed on Saturday; this balance was withdrawn the next Monday; it did not appear by whom or in what manner. The inventory was subsequently made and was verified. *Held*, that the presumption was that the balance was drawn out on the check of the assignor, executed prior to the assignment; also, that a failure of the assignor to explain the transaction did not authorize the presumption that he was the owner of the balance at the time of the assignment; that until proof



was given sufficient to authorize a presumption of fraud, the assignors were not bound to explain. *Schultz v. Hoagland*, 85 N. Y. 464.

198. The assignee of a mortgage, after condition broken, being in possession of real estate mortgaged and also being the holder of the note secured by the mortgage and the assignee thereof, can defend his possession under the mortgage, in ejectment brought by the mortgagor or those claiming under him. *Kilgour v. Gorkley*, 83 Ill. 109.

199. A creditor who fails to file his claims with the assignee within three months after the first publication of the notice of assignment is not entitled to share *pro rata* in the dividends of the estate. *In the matter of the assignment of Holt*, 45 Iowa, 301.

200. Assignment of a debt carries with it in equity an assignment of a judgment or mortgage by which it is secured. *Batesville Institute v. Kauffman*, 18 Wall. U. S. 151.

201. An order of reference, to take proof as to charges made by creditors against an assignee for the benefit of creditors, is not reviewable here, as it is an order, not final, made in a special proceeding. (Code of Civil Procedure, § 190, subd. 3). *In re Friedman*, 82 N. Y. 609.

202. An assignment for the benefit of creditors contained a clause empowering the assignee to collect the "choses in action with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." In an action by the assignee to recover assigned property levied upon by defendant as sheriff by virtue of executions against the assignor, *held*, that the clause was to be construed as simply authorizing the assignee to compromise such claims as in a sound discretion the interests of the trust required; that as so construed, the clause was not in conflict with the provision of the act of 1877, in relation to such assignments (§ 23, chap. 466, Laws of 1877), which permits the County Court to authorize an assignee to compromise any claim or debt belonging to the state; and that it did not invalidate the assignment. *Coyne v. Weaver*, 84 N. Y. 386.

203. A general assignment for the benefit of creditors authorized the assignee to "collect the notes, accounts and choses in action and the taking the part of the whole when the party of the second part (the assignee) shall deem it expedient to so do." In an action by the assignee for the conversion of a portion of the assigned property, *held*, that said provision, literally construed, simply authorized the assignee to receive payment by installments, not to satisfy a debt on payment of a portion; but even if the effect was to give power to compromise it did not invalidate the assignment. *McConnell v. Sherwood*, 84 N. Y. 522.

204. The assignment authorized the assignee "to compromise with the creditors" of the assignor for all his debts and liabilities if in the opinion of the assignee "it would be advantageous" to the creditors and the assignor. *Held*, that the effect and intent of this provision was to the payment of debts and to create a trust for the assignor and so it rendered the assignment void. (2 R. S. 135, § 1; *id.* 137, § 1). *McConnell v. Sherwood*, 84 N. Y. 522.

205. A majority of the creditors of B., an insolvent, signed an agreement with him by which he was to assign all his property for the benefit of the creditors who signed the agreement. The agreement

was to be void unless signed by all his creditors. An assignment was duly made, but was not recorded within thirty days. H. and M., creditors who did not sign the agreement, and McF., who did, obtained judgments and levied on and sold the personal estate in the hands of the trustees, under the assignment. There was no evidence that McF. had done anything to estop himself from claiming against the assignment. The court below awarded the fund raised by the sale to H., M. and McF., according to priority. *Held*, not to be error. *Lane's Appeal*, 82 Penn. St. 289.

206. A deed of assignment was made by a firm whose liabilities were \$596.41 and whose assets were \$614.18, to an assignee in trust for the creditors, which deed contained the following special clause, viz: "The assignee shall take possession of the property transferred to him, sell and dispose of the same with all reasonable diligence, either at public or private sale, for the best prices that can be obtained therefor, and convert the same into money, unless the indebtedness of the firm can be paid or settled otherwise by amicable arrangement between the creditors of the firm," etc., "and out of the proceeds of such sale, if any be made," etc. *Held*, that the deed of assignment was void. *Keevil v. Donaldson*, 20 Kansas, 165.

207. An assignment for the benefit of creditors vests the title forthwith in the assignee, though ignorant of the assignment. The moment an assignment for the benefit of creditors is placed by the assignor, or any one interested, in the office of the recorder of deeds of the proper county and within the prescribed time, the beneficial interest of the creditors, the *cestuis que sustent*, is completely vested, and it is totally immaterial when the assignee accepts the trust or whether he ever accepts it. *Mark's Appeal*, 85 Pa. St. 231.

208. An insolvent debtor may make an assignment of all of his property for the benefit of his creditors, and he may make preferences. *Hauselt v. Vilmar*, 76 N. Y. 630.

209. If the assignment be free from fraud, it will not be avoided because it will incidentally and inevitably hinder and delay creditors; the necessary delay incident to the execution of the trust is not within the meaning or condemnation of the statute (2 R. S. 137, § 1), declaring void conveyances made with intent to hinder, delay or defraud creditors. *Hauselt v. Vilmar*, 76 N. Y. 630.

210. While every person is chargeable with notice of bankruptcy proceedings, legally and properly conducted, such notice is only for the protection and efficacy of the proceedings. A party to a controversy, who does not claim under, and bases no right upon said proceedings, cannot claim that the opposite party is charged thereby with any notice whatsoever. *Page v. Waring*, 76 N. Y. 463.

211. The declarations of an assignor of a chose in action, forming no part of the *res gestæ*, are not competent to prejudice the title of his assignee, whether the assignment be for value, or merely for the benefit of creditors, and whether the declarations be antecedent or subsequent to the assignment. *Truax v. Slater*, 86 N. Y. 630.

212. The declarations of a vendor are not competent to affect the title of his vendee. *Tabor v. Van Tassell*, 86 N. Y. 642.

213. A surety upon the bond, given as required by the act of 1877



(§ 5, chap. 466, Laws of 1877) by an assignee for the benefit of creditors, brought an action in his own name, not stating it was for the benefit of others, against the assignee alone for an accounting and settlement of the trust; a referee was appointed therein to take proof, with directions to publish a notice to persons having claims to present them with vouchers in pursuance of section 786 of the Code of Civil Procedure. It was also provided in the order that any creditor might object to a claim presented, and thereupon the referee might take the proofs and report as to its validity. Subsequently, upon petition of creditors, the county judge issued a citation requiring the assignee to appear and show cause why a settlement of his accounts should not be had. *Held*, that an order was improperly granted in the action restraining the proceedings before the county judge; that said section of the Code only authorizes publication of notice when an action is brought for the collective benefit of creditors and this was not such an action; that no creditor could be bound by the judgment, nor could the purpose of the proceeding be affected in the action; that the creditors were in no sense parties to the action, and the court had no jurisdiction over them. *Schuele v. Reiman*, 86 N. Y. 270.

214. An assignee for the benefit of creditors is liable for ordinary negligence, or the want of that degree of diligence which persons of ordinary prudence are accustomed to exercise in their own business. *In re Dean*, 86 N. Y. 398.

215. The assets transferred by an assignment for the benefit of creditors consisted of property used in a livery business and debts due the assignor; there were chattel mortgages covering the property for more than its value. The assignee carried on the business for about two months at a loss, and then sold the entire property, subject to the mortgages, for one dollar. *Held*, that upon the accounting of the assignee, the items for receipts and disbursements, while he was carrying on the business, were properly rejected; that he was simply authorized to convert the assets into money and distribute it among the creditors, and the estate could not be charged with a loss incurred in an unauthorized use of the property. *In re Dean*, 86 N. Y. 398.

216. Also *held*, that the assignee was not entitled to commissions upon the value of the mortgaged property, but only on what was received therefor. *In re Dean*, 86 N. Y. 398.

217. Although a bond and mortgage may be transferred by mere delivery, there must be an intention so to transfer accompanying the delivery. When the intention is to have a written assignment, a mere manual delivery does not pass title. *Strause v. Josephthal*, 77 N. Y. 622.

218. State courts have jurisdiction of an action by an assignee in bankruptcy to set aside and have declared void a chattel mortgage executed by the bankrupt, on the ground that it constitutes a fraudulent preference within the bankrupt act, and to compel an accounting on the part of the mortgagee; it is not a matter or proceeding in bankruptcy within the meaning of section 711 of the U. S. Revised Statutes. *Ansley v. Patterson*, 77 N. Y. 156.

219. It seems, that an account may be assigned in the same manner as a chattel, and what will pass title to the latter will be equally effectual as to the former. *Truax v. Slater*, 86 N. Y. 630.

220. The remedy given by the bankrupt act (U. S. R. S., § 5120), by application to the District Court which granted a discharge, to annul it, applies only to cases where, upon some of the grounds specified, the creditor could have successfully opposed the granting of the discharge, had he known of the facts at the time of the application. *Poillon v. Lawrence*, 77 N. Y. 207.

221. An action for the conversion of securities, pledged to the defendant as collateral security for a loan, is barred by the defendant's discharge in bankruptcy. *Hennequin v. Clews*, 77 N. Y. 427.

222. It seems, that a power of attorney authorizing the assignment of mortgages, impliedly includes the assignment of bonds accompanying the mortgages. *Feldman v. Beier*, 78 N. Y. 294.

223. It seems, that, under the bankrupt act as amended in 1874 (U. S. R. S. § 5128), an assignee in bankruptcy, in order to set aside an assignment of property made by the bankrupt to a creditor, must establish not only that the person claiming under the assignment received it with "reasonable cause to believe" the assignor "insolvent," but that he received it "knowing that such assignment was made in fraud of the provisions of the act." The "reasonable cause to believe" the insolvency may rest upon conjecture, but the knowledge of the fraud must be established as a fact. *Guernsey v. Miller*, 80 N. Y. 181.

224. Of personal property after cause of action for conversion thereof has accrued gives assignee right of action; also when consideration of assignment cannot be inquired into by third parties. *McKeage v. H. F. Ins. Co.*, 81 N. Y. 39.

225. The assignment of an attorney's receipt of a claim for collection, carries with it an equity to the proceeds of the judgment. The effect of such an assignment is that the judgment creditor becomes but a mere trustee, having no right to be the judgment creditor in himself. After notice the debtors could not rightfully pay, except to the owner and holder of the order. *Richardson & May v. Lightcop*, 52 Miss. 508.

226. The assignment of a promissory note before maturity, raises the presumption of a want of notice of any defence to it; and this presumption stands till it is overcome by sufficient proof. *Carpenter v. Lougan*, 16 Wall. U. S. 271.

227. Where, for a valuable consideration received from the payee, an order is drawn upon a third person, payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund; the drawee is bound, after notice thereof, to apply the fund, as it accrues, to the payment of the order, and the payee may by action compel such application. *Brill v. Tuttle*, 81 N. Y. 454.

228. Where a draft is drawn generally, to be paid by the drawee in the first instance on the credit of the drawer, the designation by the drawer of a particular fund out of which the drawee may subsequently be reimbursed, does not convert the draft into an assignment of the fund, and the payee can have no action thereon against the drawee, unless he duly accepts. *Brill v. Tuttle*, 81 N. Y. 454.

229. Where a particular fund to accrue in future is designated in the instrument, and the language thereof is ambiguous, evidence of the surrounding circumstances may be resorted to for the purpose of determining whether the intention was that the payment should only be



made out of the designated fund, or whether the direction to pay was intended to be absolute, and the fund was mentioned only as a means of reimbursement. *Brill v. Tuttle*, 81 N. Y. 454.

230. A. & Co. being engaged in repairing a house for defendant, for a valuable consideration, executed and delivered to plaintiffs the following instrument, directed to defendant: "Pay Brill and Russell three hundred dollars, and charge same to our account, for labor and materials performed and furnished in the repairs and alterations of the house in which you reside, in the village of Mohawk." In an action upon the instrument, it appeared that the work was nearly done when the instrument was executed; the testimony was conflicting as to the amount then due. Previous to its delivery to the plaintiffs, one of them, with the drawer, called upon the defendant and requested him to accept an order for the \$300, or give plaintiffs a note or some security therefor, which he declined to do, immediately thereupon the order in question was given; this defendant refused to pay or to recognize. *Held*, that the order did not necessarily require a construction that it was a request to advance the sum specified; that the direction therein, in connection with the surrounding circumstances, indicated the intent to have been simply to direct payment of such sums as were or might become due to the drawers on the account for repairs, up to the amount specified; that thus construed, the order was an assignment of so much of the fund; and that a voluntary payment by defendant to the drawers, after notice of plaintiffs' rights, was in his own wrong, and was no defence. *Brill v. Tuttle*, 81 N. Y. 454.

231. Under an assignment for the benefit of creditors, the assignee is merely the representative of the debtor and must be governed by the express terms of his trust. *In re Lewis*, 81 N. Y. 421.

232. An assignment of the property of a debtor, in trust for creditors, executed in the name of the debtor and duly acknowledged by an attorney duly constituted for that purpose, is valid under the act of 1860 (chap. 340 of the Laws of 1860), and effectual to vest in the assignee the title to the assigned property. *Lowenstein v. Flaurand*, 82 N. Y. 494.

233. The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee affecting the mortgage; it protects as well against an unauthorized discharge as against a subsequent assignment by the mortgagee. *Viele v. Judson*, 82 N. Y. 32.

234. After the commencement of this action, plaintiff assigned to R. and A. the claim upon which it was brought; thereafter plaintiff was adjudged a bankrupt and an assignee of his property appointed; judgment was subsequently recovered, and after it was perfected, plaintiff died intestate, leaving no property, real or personal. No administrator of his estate has been appointed. Upon notice to defendants' attorneys and to the widow and next of kin of the decedent, a motion was made on behalf of R. and A. that they be substituted as plaintiffs, which was granted; defendants appealed. On argument at General Term the respondent produced and filed a stipulation of the assignee in bankruptcy waiving notice of motion and all objection to the order. *Held*, that the order was properly affirmed; that the court had a right to proceed without the appointment of an administrator of

the original plaintiff; also that the stipulation was properly received and considered by the General Term. *Schell v. Devlin*, 82 N. Y. 333.

**235.** An assignment of an account may be made by oral agreement, without writing, or any written statement of the claim assigned; and, if founded on a valid consideration, vests in the assignee a right to proceed in his own name for the collection of the debt. *Risley v. Phenix Bank*, 83 N. Y. 318.

**236.** So, also, an oral assignment for a valid consideration of a portion of a debt is valid. *Risley v. Phenix Bank*, 83 N. Y. 318.

**237.** Where, concurrently with the giving of a check for a portion of the amount standing to the credit of the drawer upon the books of defendant, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and receive the portion of the debt assigned, *held*, that the check was not the contract between the parties, and so did not render oral evidence of the agreement inadmissible; and that the parol assignment was sufficient to vest in the plaintiff a title to the portion of the debt assigned. *Risley v. Phenix Bank*, 83 N. Y. 318.

**238.** Plaintiff presented the check, and demanded payment, January 4th, 1865, notifying defendant that so much of the claim of the drawer as was represented by the check had been transferred to him; defendant's president promised to pay on presentation by some person known to the bank. On the next day when the check was again presented, defendant refused to pay, on the ground that on the morning of that day the debt had been seized by the United States, in pursuance of proceedings instituted on that day, under the confiscation acts of Congress. These proceedings were set up as a defence, and on the trial defendant, to sustain the defence, offered in evidence the record of a District Court of the United States, showing that the deposit to the credit of the drawer was attached in proceedings against the estate, property, etc., of the bank of G. (the drawer), on deposit with the defendant on January 5th, 1865, and that defendant paid over to the marshal, in pursuance of a decree of said court in such proceedings, the whole amount of the credit. The assignment to plaintiff was made in May, 1861, before the passage of the confiscation acts. *Held*, that the record constituted no defence, and was properly excluded; that if notice to defendant was necessary to complete plaintiff's title, sufficient notice was given the day prior to the seizure; that the plaintiff was not concluded by the adjudication of the District Court to the effect that the property seized belonged to the bank of G.; also that the District Court acquired no jurisdiction under said acts to proceed for the forfeiture of a debt owing to a corporation. *Risley v. Phenix Bank*, 83 N. Y. 318.

**239.** Defendant, S. E. H., assigned to plaintiff a certificate of stock in a manufacturing corporation "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. W. H. S. E. H. was the wife of E. W. H., who, at the time the assignment was executed, was largely indebted to the plaintiff and was on the verge of actual insolvency. In an action to foreclose plaintiff's lien



upon the stock pledged, *held*, that the assignment, by its terms, included and secured all demands had and held by plaintiff against E., after its execution, as well as those existing at that time; and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security; and that an extension of time, by renewals in the ordinary course of business, granted by plaintiff to E. W. H. for payment of any of the debts, did not discharge the lien upon the stock. *Mer. Nat. Bank v. Hall*, 83 N. Y. 338.

### ASSUMPSIT.

**240.** Assumpsit lies only on a claim of ownership. One who has only a mortgage lien on goods cannot bring assumpsit for their value against one who has taken them to satisfy a claim. *Randall, et al. v. Higbee*, 37 Mich. 40.

### ATTACHMENT.

**241.** Property assigned cannot be reached on attachment based on the charge that the assignment was made to defraud creditors, if the property has changed its form. That is, moneys arising from assigned claims cannot be attached, though the claims could have been reached had the attachment been levied before they were changed into money. *Matter of Freel, assignee of Foley & Co.*, 55 How. N. Y. 386.

**242.** Attachment cannot be issued against a non-resident firm. The statute must be strictly followed. *Dobell v. Loker*, 1 Handy, Ohio, 574.

**243.** An order in an attachment suit that a plaintiff has discontinued his attachment by taking judgment on the merits without filing a replication to a plea to the attachment, and striking the cause from the calendar therefor, is a final and appealable order. *Hemphill v. Collins*, (Ill.) 7 N. E. Rep. 496.

**244.** Under the provision of the Code of Civil Procedure (New Code, § 682), giving a person having a lien upon property attached, acquired subsequent to the attachment a right to apply to vacate or modify the writ, he may make application on the ground of the insufficiency of the affidavits upon which the writ was issued. *Steuben Co. Bank v. Alberger*, 75 N. Y. 179.

**245.** No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. *Hall v. Brooks*, 89 N. Y. 33.

**246.** A debt created by an award made in this state, when debtor resides here, has its status in this state, and cannot be affected by foreign attachment. *Williams v. Ingersole*, 89 N. Y. 508.

**247.** A levy by virtue of an attachment upon a promissory note creates no lien thereon, unless at the time the attachment debtor has a legal title thereto. *Anthony v. Wood*, 96 N. Y. 180.

248. In an action brought by the defendants herein against S., plaintiff's assignor, and others, an attachment against the property of the defendants was granted upon affidavits making a *prima facie* case, and upon a full compliance with all the formal requirements, on the ground that defendants were about to assign, dispose of and secrete their property, with intent to defraud their creditors. The attachment was levied upon property of S. The defendants in the attachment suit thereupon moved on affidavits to vacate the writ; the motion was denied at Special Term, but the General Term, on appeal, reversed the order of Special Term, and granted the motion. Pending the appeal, most of the attached property was sold as perishable, by order of the court. After the vacating of the attachment, the proceeds of the sale were paid over by the sheriff to the plaintiff herein, to whom was also delivered the property unsold. *Held*, that the taking of the property was not a conversion; that the attachment having been lawfully issued, was a complete justification, both to the officer and the party, and it did not cease to be a protection after it was vacated for acts done under it; also, that defendants, not having received either the property or its value, were not responsible therefor to plaintiff. *Day v. Bach*, 87 N. Y. 56.

249. An averment in an affidavit for an attachment, that "the defendant is indebted to the plaintiff in a sum stated," and that the latter "is justly entitled to recover said sum," is not a compliance with the requirement of the Code of Civil Procedure (§ 636) that plaintiff must show by affidavit that he "is entitled to recover a sum stated therein, over and above all counterclaims known to him;" and when the requirement is only met by the averments stated, the affidavit is insufficient to give the judge jurisdiction to grant the warrant. *Ruppert v. Haug.*, 87 N. Y. 141.

250. An affidavit upon which an application was based to vacate an attachment averred the issuing of the writ, and that the property of the defendant was attached thereunder; that subsequently two judgments in favor of the applicants were recovered against the defendant, executions issued thereon and "levied upon the property of said defendant." Also, "that the lien of the executions is subsequent to that of the attachment." *Held*, that the affidavit was sufficient to give the moving parties a standing in court; that no other inference would be drawn therefrom than that the attachment and executions were levied upon the same property, and that the lien of the executions was acquired after the property was attached. *Ruppert v. Haug.*, 87 N. Y. 141.

251. When a debt has been legally attached, in an action against the creditor, an active duty is imposed upon the debtor, and he is liable when by inaction he allows the attached fund to be removed from his possession. *Gibson v. Nat. Park Bank*, 98 N. Y. 87.

252. The certification of a check drawn upon a bank by the owner of a fund on deposit therein does not, while the check is outstanding in the hands of the drawer, exempt the fund from the lien of an attachment against him levied thereon. *Gibson v. Nat. Park Bank*, 98 N. Y. 87.

253. Where in an action by a judgment creditor upon an undertaking given to stay proceedings pending an appeal it appeared that



at the time of the commencement of the action the judgment had been regularly attached at the suit of creditors of the judgment creditor and the attachments were still in force. *Held*, that the action could not be maintained; that the undertaking was simply a collateral security for the judgment and passed with it to the sheriff; that it was not necessary to attach the undertaking separately as it was an incident of the judgment, not an independent liability of the sureties. *Wehle v. Spellman*, 75 N. Y. 585.

254. Upon the thirtieth day after the granting of a warrant of attachment, an order for the publication of the summons in this action was obtained, and it was published on the same day in one of the papers designated; it was delivered upon the same day to the other paper, but was not published until the next day. Copies of the summons and complaint were mailed to the defendants, as directed in the order, on the day it was granted. *Held*, (Rapallo, Miller and Earl, J.J., dissenting), that the publication of the summons was not commenced within thirty days after the granting of the attachment, within the meaning of section 638 of the Code of Civil Procedure (New Code); and that the attachment was properly vacated. *Taylor v. Troncoso*, 76 N. Y. 599.

255. It seems, that a seizure and levy by a sheriff, under an attachment against one person, upon the entire property of a firm, as the sole property of the debtor, is not justified by showing that the debtor has an interest in the property as a copartner. *Atkins v. Saxton*, 77 N. Y. 195.

256. The power of the sheriff, for the purpose of rendering the levy upon the interest of one partner in the copartnership property effectual, to take possession of the whole property, is merely incidental to the right to reach the debtor's interest; and is to be exercised as far as possible in harmony with, not in hostility to, the rights of the other partners. *Atkins v. Saxton*, 77 N. Y. 195.

257. When, therefore, the sheriff exceeds this limit; and, instead of levying on the debtor's interest, levies upon and seizes the property as the sole property of the debtor, he is a trespasser. *Atkins v. Saxton*, 77 N. Y. 195.

258. An attaching creditor cannot defend an action, brought by an assignee of the debtor, for the conversion of a chose in action attached, by showing fraud in the assignment. *Castle v. Lewis*, 78 N. Y. 131.

259. The M. G. Co., a manufacturing corporation prior to May, 1872, had three trustees, one of whom resigned. One of the others was the treasurer and general agent of the company, having charge of its property and business. The two remaining trustees left a portion of the company's goods with B. & Co. to sell on commission, and subsequently, in the name of the company, made an assignment of the goods unsold and of the proceeds of sales in the hands of B. & Co. to A., to secure a loan made by him to the company, and in pursuance of an arrangement made at the time of the loan. In actions brought by an assignee of A. against creditors of the company, who had caused the property and the avails of sales to be levied upon under attachments in their favor, defendants claimed the transfer to A. to be void for want of authority, as by the statute (§ 1, chap. 269, Laws of 1860, amending chap. 40, Laws of 1848), it is required that such corpora-

tions shall have not less than three trustees. *Held*, untenable; that the objection was not available in these actions, and defendants were not in a position to raise the same. *Castle v. Lewis*, 78 N. Y. 131.

260. Upon motion made under the provisions of the Code of Civil Procedure (§ 682) giving a person having a lien upon property attached, acquired subsequent to the attachment, a right to apply to vacate or modify it, it appeared that the attorney of the party claiming the lien delivered to the clerk of E. county a judgment-roll, including a sufficient statement in writing to warrant the entry of a judgment by confession in her favor against the attachment debtor; the clerk did not, in fact, enter the judgment, but delivered a transcript to the attorney, which was filed the next day in the office of the clerk of N. county, an execution issued to the sheriff of that county. *Held*, that the lien acquired by the docket of the judgment in N. county and the issuing of execution, upon the personal property of the debtor in that county, was sufficient, until set aside, to confer upon the plaintiff therein the rights of a lienor under said provision. *Steuben Co. Bank v. Alberger*, 78 N. Y. 252.

261. The grounds upon which a warrant of attachment was issued were, as stated in the affidavit, that the attachment debtor was "about to assign, dispose of, or secrete his property with intent to defraud his creditors." All of the material facts were stated on information and belief only; it was not shown that the persons from whom the affiant professed to have obtained his information were absent, or that their depositions could not be procured. *Held*, that the affidavit was insufficient to give the court jurisdiction to issue the attachment; and that the order granting it was reviewable here. *Steuben Co. Bank v. Alberger*, 78 N. Y. 252.

262. The provision of the National Banking Act (U. S. R. S., § 5242) prohibiting the issuing of an attachment, injunction or execution against such an association or its property before final judgment, applies only to an association which has become insolvent or to one about to become so, as specified in the preceding part of the section. 81 N. Y. 385.

263. Where equity action to restrain suit on undertaking given to discharge attachment, is not maintainable. *Kelly v. Christal*, 81 N. Y. 619.

264. In an action against a national bank organized in another state, an attachment may be issued against the property of the defendant in this state. *Robinson v. Nat. Bank of Newberne*, 81 N. Y. 385.

265. Builder's lien is, *held*, not to have attached where a builder took real security for payment of the work which he was to do, and afterwards the work being all done, gave it up and took a mere note. *Grant v. Strong*, 18 Wall. U. S. 623.

266. The rule prohibiting the splitting up a single demand and bringing separate actions at law, has no application to proceedings to vacate an attachment. *Steuben Co. Bank v. Alberger*, 83 N. Y. 274.

267. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. (2 R. S. 221, § 6, sub. 4). *Dunford v. Weaver*, 84 N. Y. 445.



268. A mere levy under an execution upon property which has been attached is not such an "actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action," within the meaning of section 682 of the Code of Civil Procedure, as will bar a subsequent lienor of the right to move to vacate the attachment. The section means an actual and real application as distinguished from a constructive one. *Woodmansee v. Rogers*, 82 N. Y. 88.

269. It seems that the only way to subject a judgment to an attachment is to serve the warrant upon the judgment debtor. *In re Flandrow*, 84 N. Y. 1.

270. In an action upon an undertaking, given to discharge an attachment, conditioned to pay any judgment recovered by the attachment creditor, it appeared that the attachment debtor, within four months after the issuing of the attachment, filed his petition and was thereupon adjudicated a bankrupt and made an assignment; he then applied to the bankruptcy court to stay proceedings in the action in which the attachment was issued; this was denied, and judgment was recovered. *Held*, that the proceeding in bankruptcy was no defence, as there was at the time no attachment lien or attachment in force upon which the proceeding could operate; and that neither the letter nor the policy of the bankrupt act was infringed by holding the defendants liable. *McCombs v. Allen*, 82 N. Y. 114.

## ATTORNEY.

271. The acts of an attorney in directing the levy upon or taking of goods upon process are in excess of his general powers as attorney, and in the absence of special authority, do not subject his client to liability. *Welsh v. Cochran*, 18 Sickels, N. Y. 181.

272. An attorney who purchases of a client a claim which is the subject of litigation, in case the propriety of such purchase is questioned, is bound to show the perfect fairness, adequacy, and equity of the transaction. *Dunn v. Record*, 63 Me. 17.

273. Attorney-at-law cannot recover for professional services, without proof of the qualifications required by statute; evidence that he is a practicing lawyer in this State is not sufficient, but he may recover disbursements. An objection, upon this ground, to his right to recover, is not too late, when taken after the argument, but before the charge of the judge. *Perkins v. McDuffee*, 63 Me. 181.

274. Where an attorney-at-law agrees to prosecute a suit or claim for one-half of whatever judgment is recovered, if no judgment is recovered he will be entitled to no compensation, when the failure to recover is not the fault of the client. *Fraatz v. Garrison, et al.*, 83 Ill. 60.

275. A general retainer does not authorize an attorney to settle or adjust claims, or to alter the terms of a contract made by the client. *Pickett, et al. v. Merchants' Nat. Bank, Memphis, et al.*, 32 Ark. 346.

276. An attorney, in fact, can not bind his principal as surety, unless he is specifically authorized to do it. *State ex rel. Merchant v. Daspit*, 30 La. 112.

277. A stipulation in a promissory note for the payment of a certain sum as attorney's fees, if suit is commenced thereon is valid, and may be enforced in an action on the note. *Danforth v. Charles, et al.*, 1 Benn. Dakota Reps. 285.

278. The rule requires that the entire professional intercourse between client and attorney, whatever it may consist in, should be protected by profound secrecy. The exemption is not confined to advice given or opinions stated, it extends to facts communicated by the client—all that passes between client and attorney in the course and for the purpose of business. The privilege is for the client and not for the attorney. The interests of justice and the protection of private rights demand the strictest confidence and privacy in this situation. *Lengsfeld, et al. v. Richardson, et al.*, 52 Miss. 443.

279. A power of attorney authorized the donee to take possession of real estate by himself or by a person in his confidence, to cultivate it, to sell it, to exchange it or to alienate it. He indorsed it to A. by a writing, stating: "I transfer all my powers in favor of A. in order that in my name and as my attorney he may take possession," etc. *Held*, that the indorsement only gave the power to take possession, but no power to sell. *Williams v. Conger*, 125 U. S. 397.

280. An authority to an attorney to collect interest on a mortgage does not authorize him to collect the principal. *Brewster v. Carnes*, 103 N. Y. 556.

281. The attorneys of the parties to an action are authorized to stipulate as to referee's fees. Such a stipulation is "the consent of the parties \* \* \* in writing," within the meaning of the Code of Civil Procedure (§ 3296). *Mark v. City of Buffalo*, 87 N. Y. 184.

282. The title of an attorney purchasing property at a judicial sale decreed in proceedings in which he acted as an attorney, falls by the law of California, with the reversal of the decree directing the sale, independent of defects in the proceedings; and conveyances after such reversal pass no title as against a grantee of the original owner of the property. *Gulpin v. Page*, 18 Wall. U. S. 350.

283. A power of attorney to sell and convey real property, given by a husband and wife, in general terms, without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorize a conveyance by the attorney, of this interest of the husband, by a deed executed in his name alone. *Holladry v. Daily*, 19 Wall. (U. S.) 606.

284. Attorney-at-law cannot be charged with negligence when he accepts as a correct exposition of the law, a decision of the Supreme Court of his state upon the question of the liability of stockholders of corporations of the state, in advance of any decision thereon by his court. *March v. Whitmore*, 21 Wall. U. S. 178.

285. Defendant commenced an action in the Marine Court of New York City against plaintiff to recover a deposit, which was also claimed by another party. In that action costs of appeal from an order had been awarded defendant. Plaintiff thereupon commenced this action for an interpleader and procured a temporary injunction restraining defendant, her attorneys, etc., from further prosecuting or carrying on



the former action, or from taking any steps to recover said deposit. *German Sav. Bank v. Habel*, 80 N. Y. 273.

286. Defendant's attorney thereafter issued a precept for the collection of the costs. In proceedings to punish said attorney for contempt, *held*, that the injunction did not prohibit the collection of the costs, and that the attorney was justified in issuing the precept. *Ibid*.

287. Attorney-at-law is forbidden to purchase an interest in the thing in controversy adverse to his client. *Cunningham v. Jones*, 37 Kan. 477.

288. Tax deed made to attorney-at-law is void, if the owner of the land was a client of such attorney at the time. *Ibid*.

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### BAILEE.

289. The voluntary relinquishment by the bailee of possession of the subject of the bailment discharges his lien unless it is consistent with the contract, the course of business, or the intention of the parties, that it should continue. *Spaulding v. Adams*, 32 Me. 212; also, *Danforth v. Pratt*, 42 Me. 52; and *Robinson v. Larrabee*, 63 Me. 116.

290. The forfeiture of a lien claim, when once incurred, is not waived by a subsequent arrangement between the parties, whereby the bailee resumes the custody of the subject of the bailment, unless such was the intention of the parties. When the bailee has parted with his possession, the presumption is that he has waived or abandoned his lien, unless his conduct, in so doing, is satisfactorily explained. *Robinson v. Larrabee*, 63 Me. 116.

291. The finder of a bank note, as against a bailee, without reward, to whom he delivers it to be kept for the finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver to the finder upon his request, and in the absence of any claim of the rightful owner made known by him to such bailee. Such bailee is not bound to use as great care and diligence in the keeping of the note as he would be if he were a bailee for compensation; and if the note was stolen from his possession, he will not be liable for it unless the loss was the result of gross negligence on his part. In such a case, to entitle the plaintiff to recover, he must show that the note was a genuine note and of the value he claimed. *Tancil v. Seaton*, 28 Grattan (Va.) 601.

292. A man dressed as a police officer told the cashier, in presence of a watchman of the bank, that he had been directed by the lieutenant of the police to warn him that there were "suspicious characters about;" the cashier told the watchman to admit no one, but he made no inquiry of the lieutenant. After the bank was closed, there then being another watchman there, the first was called from outside by name; he opened the door; a man dressed as a policeman and two others in ordinary dress came in; they overpowered the watchman,

took securities, etc., from the vault including plaintiff's, deposited for safe keeping, and kept as the bank's securities. *Held*, the bank being a voluntary bailee, without reward, the evidence was not sufficient to charge them with negligence. *De Haven v. Kensington Bank*, 81 Penn. St. 95.

293. Actual delivery by the bailee on the demand of the true owner, who has the right to the immediate possession of the goods bailed is a sufficient defence of the bailee as against the claim of the bailor, and there is no difference in this regard between a common carrier and bailees. *The "Idaho,"* (30th) U. S. Repts. 93, 575.

294. The statutes of Louisiana prohibit the issue of bills of lading before the receipt of the goods; but they do not forbid curing an illegal bill by supplying goods, the receipt of which has been previously acknowledged. *The "Idaho,"* (30th) U. S. Repts. 93, 575.

295. A gratuitous bailee of money to whom it is given for the purpose of lending it on good and sufficient security, and who, lending it to a person on property worth much more than the sum, and taking a properly executed mortgage, delivers the papers to his principal without having placed them on record, is not responsible for a loss occurring after the efflux of the term for which the money was lent, by non-recording of the papers; the owners of the security having had abundant opportunity to have them recorded himself. *Turton v. Dufies*, 6 Wall. U. S. 420.

296. A bailee, converting goods on which he has bestowed labor and acquired a lien, may, in an action of trover brought by the owner, set up his lien claim in reduction of damages. *Longstreet v. Phila.*, 39 N. J. Law, 63.

297. A receipt, in the words following, imports no legal liability of the signer thereof, and no action can be maintained upon it without evidence *aliunde*: "Received from H. N. Peden one letter envelope, sealed, and said to contain two hundred and ninety dollars." But if it be shown by other evidence that the money was received as a bailment a recovery may be had upon the receipt. And in such case the receipt constitutes a legal liability, and is assignable, under sections 670 and 2228 of the Code of 1871. *Hunt and Vaughn v. Shackelford*, 55 Miss. 94.

## BANKRUPTCY.

298. In an action against trustees of a savings bank for negligence in the discharge of their duties, two of the defendants, after the commencement of the action, filed petitions for their discharge in bankruptcy and were discharged before judgment. *Held*, that such a discharge was not a defence to the action, as the claim, being for undischarged damages occasioned by a tort, was not provable in bankruptcy and therefore not discharged. *Hun v. Cary*, 82 N. Y. 65.

299. To prevent a debt from being discharged in bankruptcy on account of power of bankrupt in creating it, the debt must be tainted with fraud in its inception. If the contract was fair and honest when made, although the debtor may subsequently be guilty of fraudulent



conduct in respect to it, yet such conduct does not destroy the benefit of the discharge. *Brown, et al. v. Broach*, 52 Miss. 536.

**300.** When the principal debtor is adjudged bankrupt, a failure by the creditor to present his claim for a dividend does not release the security. *Clopton v. Spratt, et al.*, 52 Miss. 251.

**301.** A discharge obtained under the insolvent law of one state is not a bar to an action on a note given in and payable in the same state; the party to whom the note was given having been and being of a different state, and not having proved his debt against the defendant's estate in insolvency, nor in any manner been a party to those proceedings. *Baldwin v. Hale*, 1 Wallace, 223.

**302.** Under the Act of Congress of 1874 (Chap. 390, Act of 1874), authorizing a discharge of a bankrupt by composition between him and his creditors, no debt is barred by a composition which would not have been barred under the Bankrupt Act. *Argall v. Jacobs*, 87 N. Y. 110.

**303.** A debt, therefore, "created by the fraud of the bankrupt," (U. S. R. S., § 5117), is not barred by a composition and discharge. *Argall v. Jacobs*, 87 N. Y. 110.

**304.** To avail himself of the exception in the Bankrupt Act, a creditor is not bound to base his action upon or to set up the fraud in his complaint. He may sue upon the debt or upon notes given therefor, and if the composition and discharge is set up as a defence, he may meet it by proof of the fraud; and this without serving a reply, unless a reply has been directed by the court, as provided by the Code of Civil Procedure (§ 516). *Argall v. Jacobs*, 87 N. Y. 110.

**305.** The "fiduciary capacity" in the provision of the Bankrupt Act, which excludes from the protection of a discharge debts contracted in that capacity, relates to cases of technical trust, not to such as is implied by the contract between principal and agent, and the "fraud" intended by the same provision is an active or express fraud, as distinguished from an implied or constructive one. *Palmer v. Hussey*, 87 N. Y. 303.

## BANKS.

### RIGHTS, DUTIES AND LIABILITIES OF BANKS.

**306.** Banks are generally creatures of statutory law, and when so, are corporations. As such they owe their existence to, and derive their rights from, the statute; and they are confined to the powers expressly given them by their charter, or by the statute under which they are operating, or to such powers as are necessary to the proper exercise of those expressly given.

**307.** When the act gives power to a body of men to do a banking business, it can carry on no other business, yet certain rights become inherent in the corporation to enable it to carry on the banking business, and all acts done by it as a corporation, not specially delegated to it, and not inherent in it to enable it to carry on the banking business, are illegal.

**308.** It has the inherent power to borrow money, but the borrowing must be done to enable it to carry on its legitimate business. This power is not usually given by the statute, it follows as one of the inherent rights; and, if the borrowing is for the purpose of speculating, or to invest in property not necessary for its business purposes, it is illegal. *Barnes v. Ontario Bank*, 19 N. Y. 152.

**309.** The term often employed by a banker in the business of banking in the one hundred and tenth section of the Revenue Act of July 13th, 1866, does not include moneys borrowed by him from time to time temporarily in the ordinary course of his business. It applies only to property or moneys of the banker set apart from other uses, and more permanently invested in the business. *Bailey, Collector v. Clark, et al.*, 21 Wallace U. S. 234. The question may arise, how is the bank to borrow money to use in its business? Only the board of directors have the right, or are the proper parties to authorize the cashier or the president, or both, to borrow the money. Where the power is delegated to the two, one of them has not the right to execute paper for the loan, and it will be invalid, except in the hands of innocent holders for value. *Ridgeway v. Farmers' Bank*, 12 S. and R. (Pa.) 256. *Mattheus v. Mass. Nat. Bank*, U. S. Circuit Court, District of Mass.; decided 1875.

**310.** As a corollary to the above, the bank has a right to buy real estate for banking purposes alone; this embraces, of course, land to erect a banking house upon, also to take mortgages or other security upon real estate to secure debts owing to it that are past due; and, in order to save itself, it has the power to buy the real estate so pledged in order to secure the debt, or to take the absolute title in the first instance to secure a precedent debt. And when it takes real estate in either of these ways, it has the right to sell and convey the same. But it has no right to buy and deal in real estate for purposes of speculation or investment. *Metropolitan Bank v. Godfrey*, 23 Ill. 579.

**311.** Should it purchase real estate, however, for such unauthorized purpose, and the purpose be made to appear upon the face of the conveyance, the deed being taken to the bank in its corporate name, it would probably be held totally inoperative and to be absolutely void, upon the ground that the illegal object being shown on its face the instrument would be inoperative to pass the legal title. There would seem to be no doubt, however, of the right of the bank, in such case, to recover from the vendor the money paid him for the land. When the instrument does not show on its face the unauthorized purpose, the legal title would pass; and if the vendor could be allowed to avoid it, on the grounds of public policy, which is by no means clear, it could only be upon a return of the purchase money. In case the conveyance was not set aside, either on the application of the vendor, if he have such right, or upon a proceeding by the state to annul the charter for this violation, the real estate would be the property of the bank, not to be used, however, for the illegal purpose, but should be sold by it, for the purpose of appropriating the proceeds of the sale to the legitimate business of the bank.

**312.** When the power is given in the charter of the bank to buy and sell real estate, it must be construed to be the right to buy and hold for the purposes above set forth, and sell and reinvest for the pur-



poses above set forth, and for no other ; otherwise, while ostensibly it is a bank, it nevertheless becomes a corporation to speculate in lands.

313. Generally speaking, the bank has no right to do anything that is not strictly within its charter powers or inherent therein, yet when it makes a contract which is largely beyond its powers, as, for instance, loaning more money to the directors than the charter permits, where the debtor received the consideration the bank has the right to enforce the debt, and the debtor cannot set up this want of power by the bank as a defence when he is sued on a contract. Only the state can complain, and in a proceeding for that purpose. *Hughes v. Bank of Somerset*, 5 Litt. (Ky.) 45.

314. One of the principal rights of a bank is to make discounts. This right is given by its charter of incorporation, or is inherent where it is omitted in the charter, or the bank is a private one. This can be exercised only through its board of directors, who alone are authorized to make discounts. They have no right to delegate this power, for this duty and trust is personal to the directors. And in making discounts, the bank has a right to retain the interest in advance, though it may be more than the rate allowed by law on the sum actually used, for this is the technical meaning of discount—the taking of legal interest in advance, or rather more technically speaking, the withholding the interest.

315. And where power is given a bank to discount notes, it does not follow that they have the right to buy notes at a usurious interest. The right of buying notes is an entirely distinct power, and may or may not be given by the charter of the bank. If it is given, its meaning is that the bank has only the right to buy the notes for their fair market value. It must be a *bona fide* transaction of bargain and sale. If it is resorted to to cover up usury, it will be treated as an usurious contract. *Morse on Bank and Banking*, p. 20.

316. A bank has no right to take usury in any way. It has a right to charge a commission for making collections, or exchange for selling drafts, and it will not be deemed usury if the transaction is *bona fide*, and is really a commission or exchange. *Bank of United States v. Davis*, 2 Hill, N. Y. 457.

317. The bank has a lien upon and a right to hold all moneys and funds in its hands belonging to its depositors to secure or pay any balance due from him ; also to hold all paper received from its customer for collection, for the same purpose. This right only exists where the customer depositor is also the debtor of the bank—the relation must be mutual. The party owing the bank, and against whom it claims the lien, must also be the identical party who owns the deposit, and all funds or notes or other paper coming into the possession of the bank while their relation subsists can be held by the bank to enforce this lien. *Lcese & Martin*, 17 Equity cases (England), 224 ; decided 1873.

318. If A is a partner with B, and a depositor with the bank, and the bank should have a claim against A and B, it could not claim a lien on the balance to A's credit to pay the debt due from A and B. This illustrates the relation that has to exist before the lien attaches. And again, the lien does not attach to securities placed in the hands of the bank to secure a special debt of the depositor, unless the depositor should allow the securities to remain uncalled for, and to his general

credit, after the debt is paid for which they were originally pledged, and the bank has no right to detain them after proper demand is made therefor, *provided*, of course, the demand is made at the time the debt is paid. *Ibid.*

319. The bank has the right to detain only the balance to the depositor's credit, or notes held for collection to his general account; and this right does not extend to special deposits of any kind—unless pledged to pay the debt; nor to any property of the depositor of which the bank may become possessed by mistake or casualty, or otherwise than by the consent of the depositor. *Ibid.*

320. Where the depositor owes the bank several demands, the bank may set off the balance to his credit to any one of the demands it may select. (*State Bank v. Armstrong*, 4 Dev. 519). But the bank has no right to claim the lien, or to make the set off, until its depositor's demand is due; for instance, if the bank should become possessed of a demand against its depositor which was not due, it could have no right to hold any balance that may be to his credit. In case, however, of the insolvency of the depositor, it is very probable that a court of equity would permit the bank to retain out of the balance to his credit a sufficiency to meet the demand when it does fall due. *Ibid.*

321. In one case it has been held that where the depositor died and his estate was insolvent, that a court of equity would allow the bank to withhold funds to his credit to pay a note not then due. Whether a court of equity would order a full or only *pro rata* distribution in favor of the bank is beyond the scope of this article to discuss. *Ibid.*

322. Even when the note falls due the bank is not compelled to set apart at once from the depositor's balance sufficient to pay the same; it can hold the note or demand, and has a right to set apart or hold funds, to pay same at any time. And all the time after its maturity the note or demand will bear interest. But it would seem to be the more proper course for the bank upon the maturity of the demand, to pay the same from the funds of its depositor in its possession. *Ibid.*

323. The bank has no lien on boxes and contents of the same, left with it by its depositor for convenience.

324. And where the depositor leaves certain securities with the bank to secure the payment of certain specific notes or bills, and they are paid, and the securities are not withdrawn, and should the depositor die or become bankrupt, the bank has the right to hold the securities against the representative of the depositor, to reimburse itself for other bills or general balance due from the decedent or bankrupt. *Prov. Assurance Co. v. Nat. Bank*, 14 Equity (England), 507; decided 1872.

325. And where the depositor is a member of a firm which has an account with the bank, and keeps also an individual account in the same bank, it has no right to confuse the two accounts; nor where he keeps an account both individually and as trustee, has the bank the right to retain the balance due to him in one capacity to pay a debt due from him in the other; and should the bank allow the depositor to transfer the balance due him as trustee, and place it to the credit of his individual account, the bank, as well as the faithless trustee, would be liable to the beneficiary for the conversion of the trust property.



Of course the bank must be cognizant of the fact of the misappropriation of the trust fund, before it will be bound to the beneficiary. *Ibid.*

326. A bank, it has been held in a well considered case, has the right to refuse to transfer shares of stock of its stockholder, where it has any lien thereon, until the lien is discharged, and that, too, although the shares belong to an individual partner, and the debt is a firm debt—though the bank may have a balance in favor of the firm at the time of its refusal to make the transfer. *Mechanics' Bank v. Earle*, 4 Rawle, Penn. 384.

327. And where the by-laws of the bank forbid the transfer of its stock, while the owner is indebted to the bank, and the owner does transfer it to another to enable the transferee to obtain a loan or discount on the strength of the stock, and he so obtains the loan from that bank, the stock will be liable for the debt of the transferee. *Burford v. Crandell*, 2 Cranch, 86.

328. But where the statute of the State gives the bank a lien on its stock for whatever its depositor and owner of the stock may owe the bank, all parties are bound to take notice of the lien; and should the stockholder, while indebted to the bank, make an assignment of his stock, though to a party for value and ignorant of the indebtedness to the bank, or of the fact the law gives the lien, yet he will take the stock subject to the lien. *Union Bank v. Laird*, 2 Wheaton, 390.

329. Also, where the depositor dies, having a balance on the books of the bank to his credit, and owes the bank on a judgment and also on a contract not in a judgment, the bank has the right to sell off his balance against the contract debt, and thus secure whatever advantages the judgment lien may give it on other property of the depositor. *State Bank v. Armstrong*, 4 Dev. N. C. 519.

330. Where a bank had a mortgage on real estate to secure general balance due from its depositor, and who died considerably in debt to the bank with the debt thus secured, and who had given, by will, power to his executors to charge his real estate for the benefit of his personal property, and the executor had largely increased this indebtedness to the bank by using funds in various improvements, and for the expenses of the widow; and where the real estate mortgaged to the bank proved insufficient to pay the debt, the court held that the bank had the right to prove the balance of its debt remaining after the sale of the mortgaged premises against the general estate of the decedent. *Farhall v. Farhall*, 12 Eng. Law Rep. 98; decided May, 1871.

331. Where a customer has two accounts at two different places, one at the mother and the other at a branch bank, and has a balance to his credit at one bank, but his account is overdrawn at the other, the bank has the right, in the absence of a special agreement, to transfer sufficient funds from the account where there is a balance to make good the other and overdrawn account, and in this way be protected in not paying the check of the depositor drawn against his balance in the bank where his account is good. *Garnett v. McKewan*, 8 Exch.(Eng.) 10; decided in 1872.

332. The question is not raised in this case whether the bank would have the right to make this transfer if it had agreed, on opening the two accounts, to keep them entirely distinct. *Ibid.*

333. One of the chief conveniences banks are to a business com-

munity, is to have a well-known and designated place where bills and notes can be made negotiable and payable, and it is the custom of business men to have all their paper made payable at the banks where they deposit. When such a bill or note is presented to his bank, made or accepted by him, unless he has forbidden the bank so to do, it has a right to pay the same out of any balance the depositor may have to his credit, and will be protected in so doing; for the bank will have a right to presume that the depositor so intended that his note or acceptance should be paid by his bank, at its maturity, without further instructions from him, otherwise he should not have made his paper negotiable at the bank, or should have given instructions to his bank. Even should it be that the depositor had a good set-off to the paper so paid by the bank, yet it would be protected in paying it, unless the depositor informed the bank not to pay it. In fact, it is the duty of the bank to pay negotiable paper of its depositor made payable at his bank, and if the bank should fail to pay it, unless so instructed by the depositor, it would be liable in damages, should any follow. *Mandeville v. Union Bank*, 9 Cranch, 9.

**334.** In *Wood & Co. v. Merchants' Savings Loan and Trust Co.*, 41 Ill. 267, the Court held, in a case where a note of its customer was made negotiable and payable at the bank where the drawer kept his account, and where the note was held by a third party, that the bank had no right to pay it unless specially instructed so to do. But if the note belongs to the bank it has a right to pay it out of the funds of its customer—the drawer of the note—without any special instructions, and the bank can appropriate sufficient funds of the drawer to pay the note. The rule is this: where a note of its customer is made payable at the bank, and is held by it, it has the right to pay it, out of its funds, or even to charge it to him, where he has not the funds on hand; but where the note is held by a stranger, it cannot do so without special instructions.

**335.** The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law. *Morse*, p. 25.

**336.** So, before the bank can be made a debtor to its depositor, the depositor must give it a full consideration; that is, must deposit to his credit coin or notes received by the bank as money, and which are entered to his credit as so much money.

**337.** And if the bank has given a depositor credit on forged paper, on counterfeit notes or coin, there is no consideration received by the bank, and it has a right to cancel the credit. But where the credit was given on counterfeit or forged notes of the same bank where the deposit was made, and a reasonable time has elapsed for the bank to examine the notes and it does not repudiate, it has no right to cancel the credit, for the bank is supposed, nay, bound to know the genuineness of its own issue. The same is true where credit is given to one depositor on a forged check of another depositor of the same bank. Yet, even in this case, though the bank should enter credit for its own counterfeit issue, it has a right to cancel it, *provided* it is done at once, a very short time will be too late; the next day will be too late. *Bank*



of *United States v. Bank of Georgia*, 10 Wheaton, 342; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

338. A depositor cannot maintain an action against a bank, without a previous demand by check or otherwise. *Doanes v. Phoenix Bank*, 6 Hill, N. Y. 297.

339. Where the dealings between a bank and a customer were entered in a single account, the latter being credited therein with the proceeds of notes discounted, with drafts accepted, and moneys deposited; and when, in accordance with the uniform custom of dealing, indorsed notes of the customer discounted by the bank were charged to his account as they matured, without protest, and were thereafter surrendered to the maker, *held*, that this was a payment, and that a mortgage securing the payment of the notes was thereby discharged. *Crocker v. Whitney*, 71 N. Y. 161.

340. Where parties seek to negotiate loans from a bank, it is the right, nay, the duty of the bank, to investigate the title and true ownership of stock certificates which are offered as collateral security for the loan, especially if the parties are not known to the bank, so as to satisfy itself beyond question that the party offering the certificate of stock has a perfect right to do so.

341. Certificates of stock are not negotiable like promissory notes, and possession in hands of innocent holders even does not confer title, in case they have been stolen from the true owner or altered as to the amount they represent. The above is laid down as the true principle governing such certificates by Hon. I. R. Redfield in a note to *Matthews v. Massachusetts National Bank*, as reported in March number, 1875, of Am. Law Register, and is well supported by authorities.

342. Mr. Morse says: "The old rule of law was, that a corporation could do no act save by a deed executed under its corporate seal. But this ancient principle has of late years been done away with by the compulsion of the practical necessities of business. But the simple truth is, that the elastic expansion of modern business has irrevocably snapped the clumsy and useless ligament, which older generations found less intolerable." And as the results of this "elastic expansion" most of the acts of banks are now done by its agents.

343. These agents, known as officers of the bank, have each his name, which of itself designates his duties; and his duties are separate and distinct from those of the other officers. These several officers or agents are appointed by the directors; and when an agent is properly intrusted with the duties of his office the bank is bound by all his acts and words when within the line of his duties. When the question of the liabilities of banks is discussed, this point will be more enlarged upon. And although certain specific duties fall to each officer, yet the bank, through its directors, has the right to restrict or enlarge his special duties; but if the directors exercise this right, any change from duties usually performed by such officer must be brought home by actual positive proof, showing that the party was aware of the restriction, before he can be affected by it. A party dealing with the bank has the right to presume that its officers have the powers usually exercised by similar officers in other banks. *Stagg v. Elliott*, 12 C. B. N. S. 373.

344. And as a corollary to the above, as will be discussed here-

after, the bank is bound by knowledge of a fact on the part of the officer whose function includes the business to which the fact relates, but it is not bound to take notice of a fact which comes to any other officer whose business or duties do not embrace the matters to which the knowledge refers; for instance, knowledge by a clerk of residence of an indorser, or of pendency of a suit against the bank, is not knowledge on part of the bank, as it is not the duty of the clerk to attend to such matters. So a bank has the right to repudiate the act of its officer when the act is one which the officer could not legally do, or which could not be legally delegated to him by any kind of formality—even by the directors—even should a third party suffer by the repudiation; as every person is presumed to know what functions or duties it is in the power of each officer to perform, as it is a part of the law of the land. For instance, should a clerk certify a check when the drawer has no funds, this act the bank can repudiate, for it was not the duty of the clerk to certify checks at all, and he could not bind the bank when the drawer had no funds, unless the bank was in the habit of permitting this clerk to certify checks. *Lloyd v. West Branch Bank*, 15 Penn. 172; *Godloe v. Godley*, 21 Miss. 233.

345. As above stated, the bank has a right to devolve special duties upon any one or more of its officers, and the acts of said officers, within the line of this special conferred power, will be valid—for instance, the directors can give power to its president or cashier to borrow money and to execute the necessary papers therefor, and, if necessary, to mortgage real estate for this purpose. *Leggett v. New Jersey Banking Company*, 1 Saxt. (N. J.) 541; *Burrill v. Nahant Bank*, 2 Metc. Ky. 163.

346. And it has the right to repudiate any loan made to it, or its directors, or its officers, for any improper purpose—for a purpose which a bank has no right to engage in—*provided*, the party making the loan had knowledge of the illegal purpose for which the loan was made. *Bank of Kentucky v. Schuylkill Bank*, 1 Par., Sel. C. 180.

347. In a case of emergency, where it is manifestly for the interest of the bank, it can, by its proper officers, make a compromise of a bad debt, or even sacrifice some of the bank's property, and when any one of its officers is in arrears, a compromise can be made with him. The above fall to the province of the directors. *Frankfort Bank v. Johnson*, 24 Maine, 490.

348. As it will be discussed in its proper place—the liabilities of banks for the acts of its officers, when performed within the line of their duties—it is proper to say here, that the bank has a right to assume, as toward its officers, that they know what their respective duties are, and that they are acquainted with all the facts, which they would have known had they attended to their duties properly; it can assume that every director knows that the cashier cannot part with the paper of the bank, without consideration therefor; and they have a right to hold, where a director takes the bank paper, or other property, when the officer parting with it had no right to use it, that the director is not an innocent holder. *Gillet v. Phillips*, 3 Kern, 114.

349. And a bank can repudiate the acts of its officers which do not fall within the line of their duties. *Ibid.*

350. It can also repudiate its own bills, if they are stolen and put



into circulation in a partially unfinished state, only needing the signature of the president to make them possess all the requisities of genuine bills; for, before they can be circulated, the signature will have to be forged. And although, in such case, these bills will apparently be genuine, yet the bank will have the right to refuse to pay them. *Salem Bank v. Gloucester Bank*, 16 Mass. 1.

351. So, when a director or other officer of the bank becomes guilty of malfeasance or any act transcending his authority, or in violation of any rights of the bank, the corporation has a right, and it also becomes its duty, to enforce a claim it thus has against him, and this claim becomes part of its assets, and which it must push with vigor, even as when seeking to recover any of its other assets. *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

352. And when a director or officer makes any fraudulent or false representation, as to its stockholders, the solvency of the institution or the value of the shares of stock, the bank is not bound by the declarations, even though they were made by the officer while in the discharge of his duties and during banking hours; for it is not part of his duty to make such statements, and the bank does not hold him out as possessing authority to do so. The party who relies on such statements must do so on the individual responsibility of the officer or director who makes them.

353. But where the bank in its corporate capacity, in a statement or report designed to be official, over the signature of its regular officers, should make representations that are false, it is bound to any one who may rely thereon. *Cullen v. Thompson*, 9 Jurist, N. S. 85.

354. Should it appear that the bank in this official way puts forth false representations as to its condition, it is doubtful whether the directors can be held individually bound for any resulting damages; the corporation, it would seem, is alone bound, and cannot avoid the liability. Yet, if the directors should make the representations with the intent to deceive the plaintiff who claims to have suffered damage, and the proof is clear, they can be held individually. *Mabey v. Adams*, 3 Bosw. 346.

355. The directors are elected from the stockholders, and usually the largest stockholders are chosen, persons most interested in the prosperity of the institution. The duties of the office usually do not require much of their time, and it is rendered gratuitously, and the bank is under no obligation to compensate them for services, unless a special contract to that effect was made. *Loan Association v. Stone-metz*, 29 Penn. 534.

356. But where a director renders services for the bank wholly outside his ordinary duties as director, at the request of the board of directors, and which he is not bound to do as director, he can recover for such services. *Chandler v. Monmouth Bank*, 1 Green, 255.

357. A bank can repudiate a transfer of its funds, by its correspondent, when made to pay the private debt of its officers, even though it be the president. Of course the correspondent must have been privy to the illegal use of the money. *Reed v. Bank of Newburgh*, 6 Paige, 337.

358. But if the bank deposited its money so carelessly that the bank of deposit is misled into thinking the fund belongs to the presi-

dent, then it will be protected in the payment, and the other bank must suffer the loss, which was brought about by its own carelessness. *Fulton Bank v. New York and Sharon Canal Co.*, 4 Paige, 127.

359. As before stated, each bank has its officers to transact its business, and the official name of each officer usually designates the peculiar duties he has to perform. The president can represent the bank and bind it in many transactions, but they must be within the line of his ordinary duties and powers, or the bank will have a perfect right to repudiate the same. The Supreme Court of Massachusetts, as reported in case *Foster v. Essex Bank*, 17 Mass. 479, held, 1. That a bank president has no right to agree to receive deposits of money on interest, it not being the part of the ordinary business of that bank to do so.

360. Nor, 2. Can the president charge the bank with a greater liability for the safety of a special deposit than it was wont, ordinarily, to undertake?

361. Same principal will apply to undertakings on the part of the cashier or other officer. To further illustrate: Should the clerk or bookkeeper receive a deposit or subscription for stock, the bank is not bound for, and has the right to repudiate the same, as the clerk and bookkeeper are not the proper officers to receive deposits or subscription of stock. But if the bank has permitted these officers to do these acts, although not strictly in their line of duties, yet the bank cannot avoid the liability. *Manhattan Co. v. Lydig*, 4 Johns. 377.

362. And should the clerk or bookkeeper receive deposits of money, and had not been in the habit of doing so, or the bank did not know of or ratify the act, and the money is embezzled by the clerk or bookkeeper before it was actually placed to the credit of the depositor, the loss will be that of the depositor; for, by giving his money to this officer, he makes him his own agent. 1 Wallace, U. S. 234.

363. The bank can ratify any act done with its officers or agents and get the benefit therefrom. Especially is this so if the transaction is intended to be with the bank, although done in the name of the officer who attends to the transaction. For instance, should the cashier take paper endorsed or made to him as cashier, the bank has the right to hold the parties on the same, and can sue in its own name; and this is so whether the word cashier appears on the paper or not. *Baldwin v. Bank of Newbury*, 1 U. S. Wall, 234.

364. The word cashier, or president, or whatever name the contract may be made in, are only words descriptive of his office, and, in fact, the contract is one with the bank, although technically with the individual who is cashier, and the bank has the right to so consider it. Of course, if, as a matter of fact, the contract was not made on the part of the bank, the word cashier, etc., adds nothing to it.

365. It is supposed that when a bank opens for business it will take on deposit the funds of any person who may apply to be one of its customers. But this is not so.

366. A bank is not like a common carrier, bound to accommodate any one who may apply. It has the right to select its customers from those who may apply, and this selection can be done without giving any reason therefor, and the bank can not be held bound for its refusal. It can also cause the customer, once permitted to make his deposits, to



remove his balance, and can refuse, further, to allow him the privilege of being a customer; and, ordinarily, it is the duty of the cashier to make this selection, unless the directors assume this duty. *Thatcher v. Bank of State of New York*, 5 Sandf. 121.

**367.** And where a stranger leaves money with the bookkeeper or the clerk, to be for him deposited and applied to the payment of his note, he does not thereby become a depositor, and the bank assumes no liability for the application of the fund thus thrust upon it without its consent, expressed through the proper officer, who is usually the cashier or receiving teller.

**368.** Should the officer of the bank undertake to do official acts away from the bank—as, for instance, should the receiving teller, outside the bank, receive money from a depositor, the bank has a right to repudiate it; or, should the cashier certify a check good, although he is just from the bank, and knows that when he left the drawer of the check had funds to his credit, yet the bank can repudiate this act, for the funds may be drawn out before the cashier returns.

**369.** Yet, if the cashier should thus certify a check outside the bank, and he had been in the habit of so doing, and not restrained by the bank, should the check come into the hands of an innocent holder, it is a question as to whether the bank is not bound. *Bullard v. Randall*, 1 Gray, 605.

**370.** Still the bank can ratify all irregular acts of its officers and agents, and look to them for indemnity against loss. See *Morse*, pp. 174, 175.

**371.** Should the cashier pay a check purporting to be drawn by one of its customers, but which is in fact forged, the bank is bound, as it is the duty of the cashier to pay checks, and he is bound to know the signature of the customers of the bank; but the bank is not bound if the forged check is shown the cashier, and he should reply it was genuine when the question is asked him, as the bank agrees only to pay checks of its depositors, when it has funds of its depositor, but does not agree to set itself up as an expert to decide on the genuineness of the signatures of its depositors, and if the cashier does more, he does so without authority.

**372.** But should the party presenting the check tell the cashier he is about to take it, and he should tell him it is a genuine signature, and, relying on the judgment of the cashier, the presenter should take the check, the bank would then be bound. *Espy v. Bank of Cincinnati*, 18 Wall. 604.

**373.** *Overdraft by an agent*, of his principal's account, with the knowledge of the cashier of the bank, the credit being extended to the principal, amounts to a simple loan of money, and does not involve moral turpitude, whether the cashier had authority to extend such accommodation or not. The authority of the cashier cannot be questioned in an action by the bank to recover money. The case of *Union Bank v. Mott*, 39 Barb. 180; affirmed in *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colorado, 248.

**374.** The president of a bank is not authorized to certify his own check. *Claflin v. Farmers' and Mechanics' Bank*, 25 N. Y. 86.

**375.** When a bank requires and takes from its officers bonds for the faithful performance of their official duties, these bonds, generally,

are so drawn as to cover ignorance of duty, gross negligence of duty and also dishonesty, and for a failure to comply with the requirements of the bond, the bank has a right of action against the sureties of the officer. *American Bank v. Adams*, 12 Pickering, 303.

**376.** Where the directors of a bank suspect any officer of fraud upon the bank, or any unfaithfulness to his trust, it is their duty to immediately dismiss or suspend him. Unless they act with promptitude, the sureties of the officer will be discharged from liability for any wrong committed after the suspicion is aroused and brought home to the knowledge of the directors. But even should the directors fail to suspend or dismiss the suspected officer, it will not relieve the sureties from liability for any wrong committed by him before the suspicion is aroused. *State Bank v. Chetwood*, 3 Halst. 1.

**377.** Though the directors of the bank are bound to good faith with the party who proposes to become surety on the bond of its officer, and are required to disclose to him any facts known to them which will materially enhance his risk by becoming such surety—such as, that the officer is guilty of negligence or has been guilty of frauds—yet the surety will be liable to the bank for any fraud committed during his term of office, where the officer was guilty of fraud on the bank before the execution of the bond, but where the knowledge of the fraud was not, as a matter of fact, known to the directors; and that is true, even though the directors were guilty of gross negligence in not discovering the fraud. *Tapley v. Martin*, 116 Mass. 275; decided 1874.

**378.** The sureties of the officer are, of course, not bound for any fraud committed before they become such sureties, unless afterwards, and while they were such sureties, the officer should do an act which tended to make the fraud more complete. The occurrence of any substantial part within that period is enough to make the liability attach. *Morse*, p. 219.

**379.** A bank has the right to refuse payment of a check when the same is ambiguously drawn or worded, or when there is anything suspicious about the check, until it can satisfy itself beyond all doubt; on the ground that the depositor must aid the bank in the difficult task of deciding a question so vitally important, lest a fraud be perpetrated on the bank; and when the check is so loosely drawn as to show a doubt on its face as to its regularity or genuineness the bank pays it at its peril, and it has the right to take time to look into it.

**380.** The sum to be paid must be plainly and explicitly set forth, and it must be drawn to be paid in dollars; it must be addressed to the bank where the depositor has funds; it must be dated, for a check is not payable until it is dated; it must be so written as to show that the bank is ordered or requested to pay it; it must be signed by the drawer, and drawn payable to some one or to bearer. And the bank has the right to require that the check shall have, substantially, all the above requisites before it pays the same. See *Morse*, pp. 234-238.

**381.** The question as to whether a check, payable by its terms several days after it is drawn, is entitled to grace or not, is involved in a distressing state of doubt. Directly contrary decisions have been made on this question by courts of last resort. The doubt and uncer-



tainty have arisen from uncertainty in the answer to a question lying back of the former one, to wit: Is such a check in every essential point a bill of exchange; if it is a bill, then of course it is entitled to grace. The answer to this question again must be sought still further back. On whom and by whom is the paper drawn?

**382.** The definition of a check is as follows: It is an order upon a bailee of funds, either a bank or banker, to transfer a named amount of money held on deposit for the drawer, to the drawee, or to his assignee.

**383.** Now, then, if the paper in question indicates that it is an order drawn by a customer on his bank, to pay over a portion of his deposit to the payee, then the paper has the essential elements of a check, and is not entitled to grace.

**384.** If, however, it indicates by its terms, or if there is any other paper or direction accompanying this paper, indicating that it is drawn on a merchant, or that, by special agreement of the parties to the contract, grace is contracted for, then the paper becomes a bill of exchange and entitled to grace. These principles are laid down in the recent case of *Champion v. Gordon*, decided by the Supreme Court of Pennsylvania, and in the able note of Hon. I. F. Redfield to this case, in January number, 1873, of American Law Register. The case and the note treat the question on principle and reach the above conclusion; and while perhaps courts of other States may not follow this ruling, they are probably the safest guide to the practical banker that can be given to-day. And the legitimate conclusion is, that where the paper is drawn on a bank or banker and payable some days after it is drawn, with nothing more, it should be presented and protested for non-payment on the day it is made payable.

**385.** Of course, a check payable, as checks are ordinarily drawn, not designating any day for payment, is, like bills and notes payable on demand, not entitled to days of grace.

**386.** Whenever a bank receives one as a customer and takes his funds on deposit, it thereby agrees and is bound to pay all orders or checks drawn on it by the depositor, *provided* the depositor has sufficient funds to his credit not otherwise appropriated. If he has a balance to his credit, but not sufficient to pay the check in full, the bank has a right to refuse to pay the check.

**387.** Whether the bank should pay the check in part, or so far as this balance of the drawer may go, is very questionable. The principle is, that the depositor orders the bank to pay a sum certain, and not part of the sum, to do a certain act and not part of it; and, it seems, the proper course for the bank to pursue, is to pay the whole or no part of it. This is a right it can exercise, and should do it, and it certainly will be protected.

**388.** While it is the duty of the bank to pay the first check that is presented, yet the first may be for more than the balance to the credit of the drawer, and the bank can refuse to pay it, and when the second is presented, if for less, then it has a perfect right to pay the second, although it may have knowledge that another check has been presented for payment prior to the one it is paying, but for an amount greater than the balance to the credit of the drawer.

**389.** It is the duty of the bank to pay all checks properly and in-

telligently drawn on it by its depositor where he has sufficient funds to meet it, and if the bank refuses to pay them it is liable for all damages that may accrue to the drawer.

390. But the bank has the right to refuse the payment of all checks which are presented in a suspicious manner or a questionable shape. At least it has a right to refuse the payment of the same until it can satisfy itself that it would be safe and proper to pay it; for instance, the check may be torn and pasted together again, the bank should refuse to pay it until it could investigate the matter, but it should reserve funds of the drawer sufficient to pay it, should the fact turn out to be that it was accidentally torn, or torn with no intention to destroy it. *Scholey v. Ramsbottom*, 2 Camp, 485.

391. Should a check be presented to a bank drawn for an amount greater than the balance to the credit of the drawer, as above said, the bank has the right to refuse payment, and is not bound to pay the balance and have it credited on the check, for the holder has a right to the check until it is paid, and in that case the bank would have no voucher. This is an additional reason to the one above why the bank has the right to refuse part payment of the check: it was not ordered to pay in part, and must have the check in its possession, if it pays it.

392. But should the holder of the check offer to take the balance to the credit of the drawer and surrender the check, it is then the duty of the bank, as will be fully discussed under the head of duties, to pay the balance to the holder and take up the check.

393. The question may often arise as to the length of time a bank may hold a check before it will be considered as having accepted it. As above said, where there are any suspicious circumstances surrounding a check, as when it has been torn and then pasted together, or where it is presented an unreasonably long time after its date, the bank has the right to take time to investigate the suspicious circumstances and fully satisfy itself before it can be held liable for non-payment; so, where a bank receives a check, drawn on it and sent for payment by one of its correspondents from a distance, it may retain the same a reasonable time to examine the customer's account to satisfy itself whether to pay it or not without being held as acceptor.

394. In case *Oberman v. Hoboken City Bank*, 31 N. Jersey, 563, the bank retained the check twenty-four hours, and it was then returned marked "not good," and the court held that the bank had the right to retain it that time without making itself liable.

395. Whenever a dishonored check is taken by a party, he then takes it subject to all the equities in favor of the drawer. A check is dishonored when payment is refused for any cause; but when there is no mark to indicate that demand has been made and payment refused, it will not be deemed dishonored until a reasonable time has elapsed after it is payable. In *Ames v. Meriam*, 98 Mass. 294, a check taken ten days after it was drawn was held not open to equities in favor of the drawer. Probably a much longer time may elapse, according to the circumstances of the case, and the bank be safe in paying a check, or a party in taking it, and still it would not be open to equities; but, as before said, it is safe for the bank to be cautious.

396. So, if a stale check, say a year old, should be presented for payment, this of itself would be sufficient to put the bank on enquiry,



and would give it the right to delay payment until proper enquiry could be made. *Cowing v. Altman*, 1 N. Y. Supreme Court Reports, 494; decided October, 1873; *Gerome v. Com. Exchange Bank*, 5 same; decided January, 1875.

397. In this last case the facts were these: A bank certified a check for the drawee, and he retained it for seven years; he then transferred it. In the meantime the drawer had withdrawn all his funds, the bank not having charged him with the certified check. And, while in this case the court rest their opinion on another point, still a sufficient warning is given to banks not to pay stale checks, although certified, without careful enquiry. It is their right to refuse payment until perfectly satisfied that there is nothing suspicious in the transaction, and they should always exercise this right.

398. And where a check is presented for payment, not properly signed, as where it requires the signature of another besides the drawer, the bank has a right to refuse its payment; yet, should the bank pay it, and the funds go to the proper party, or reach the proper channel, the bank will be protected in the payment. It is, however, a dangerous plan for banks to pay any check not properly signed, as it is often very difficult for it to trace the funds, should it be called upon to defend. *Coate v. Bank of U. S.*, 3 Cranch, 50.

399. So, where persons, without being legally appointed directors of a corporation, yet assumed to act as such, and apparently acted under the provisions of the charter, and drew checks as such acting directors on a bank, the bank was protected in paying them, although the money was wasted, and although these persons were never elected by the stockholders, who were, in fact, ignorant of the whole transaction, and whose money was virtually stolen by the drawers of these checks. *Holyford Mining Co. v. Nat. Bank*, 5 Irish Rep. 516; decided in 1871.

400. The depositor has the right to revoke the payment of any checks drawn by him upon giving the proper notice to the bank, and it has the right and will be protected in refusing the payment of the same. But this power of revocation must be exercised on the part of the drawer before the check is presented for payment, and before the bank has in some way obligated itself to pay it. Even after the check is presented, but if not paid for some reason, the drawer can revoke it, unless the bank has in some way bound itself.

401. And even should the bank certify a check, it has the right to recall it, if it was done through mistake, as where the drawer had no funds, or it was certified through fraud; *provided*, it repudiates its act very promptly, while the check remains in the hands of the party presenting it, and the holder has in no way been prejudiced by the repudiation, as that he has parted with property or security on the strength of the bank certifying the check as good. *Irving Bank v. Wetherald*, 36 N. Y. 335.

402. Acting under the above principle that the drawer can revoke his checks before presented, the bank has the right to refuse and should refuse payment of a check drawn payable some days after it is dated, if it should be presented on any day prior to such a day—or else, if it pays it, it is done at its own peril, for payment might be countermanded, and the course of the bank is clear. It has the right, and

should unquestionably exercise it, not to pay any check before the day on which it is made payable, nor to certify the same, nor in any way bind itself to its recognition. It may here be remarked, that although the drawer has the right to revoke his check before presentment and payment, yet should it come into the hands of a third party, an innocent holder for value, it is very questionable whether he would have the right to revoke payment.

403. The bank has no right to and makes itself responsible when it pays or certifies a check before the day on which it is made payable. *Clarke v. National Bank of Albion*, 52 Barb. 592.

404. The general doctrine is, that where a bank receives paper for collection and has it protested for non-payment or non-acceptance, its absolute duty extends only to the notifying of the person from whom the collection is received of the dishonor.

405. Usage or special contract may, however, change this rule. It is of course best to notify all the parties, as the above rule is not operative in all the States; but the preponderance of the authority is in favor of this rule. But if the bank attempts to notify all parties it is its duty to do so correctly, as an attempt to notify all the parties to the dishonored paper will be regarded as *prima facie* evidence that the bank contracted, or that it is the usage of that place for banks to notify all parties. *State Bank v. Bank of Capitol*, 41 Barb. 343.

406. The bank has the right to assume that reasonable and well-established usages, either of banks in general or of that particular bank, enter, as elements, into any particular contract made with its customer, or with the party who makes his paper payable at that bank; and those features of the contract which were not definitely settled by the parties will be governed by the usage; and the bank has the right to assume further, that its customer is familiar with and is willing to be governed by that usage. *Bank of Columbia v. Maryland*, 6 Har. & J. 180.

407. But when the bank becomes owner of paper which was not made payable there, then the presumption that the drawer was familiar with and implicitly agreed to be governed by the usage of that particular bank does not exist, and the usage will not enter into the contract. *Ibid.* 180.

408. Where one bank transmits paper for collection to its correspondent, the question whether the collecting bank has the right to place the proceeds of the collection to the credit of the transmitting bank as against the true owner of the paper, whose name is not disclosed, becomes very important.

409. And it is well settled by well considered cases that the collecting bank cannot place proceeds of paper sent it for collection to the credit of the transmitting bank, so that the true owner will lose it in case of the failure of the transmitting bank. *Bank of the Metropolis v. New England Bank*, 7 How. 234.

410. Although the two banks may have for years been crediting each other with proceeds of collections thus mutually sent, yet this usage will not avail the bank as against the claim of the true owner of the paper.

411. But where the collecting bank shows that it advanced money on the collection to the transmitting bank, not knowing the paper be-



longed to its customer, it seems, then, in case of failure of transmitting bank, the loss would fall on the customer. *Dod v. Fourth National Bank of New York*, 59 Barb. 265; *Miller v. Farmers' and Mech. Bank*, 30 Md.

412. The true rule is this: Where the bank to which the paper is sent is ignorant of the true owner, and supposes it belongs to the transmitting bank—there being nothing on the paper to put it on its guard—under these circumstances, and these only, it becomes a *bona fide* holder, if it advances money or values on the paper *at that time*; but the mere placing it to the credit of the other bank, and seeking to make the paper pay an old debt due from its correspondent, will not make the bank a holder for value. This rule is dictated by common sense, and is well supported by the foregoing cases.

413. Of course, it is not meant by this statement, that the collecting bank cannot place the proceeds of the collection to the credit of the transmitting bank, but that, in the event that the transmitting bank fails before settling with the owner of the paper, the owner will not be precluded from the credit so given, but can still go on the collecting bank as for money had and received by it for his use.

414. Where the bank which receives paper for collection from its customer, and transmits it to its correspondent, credits the customer with the amount of the collection, under the belief that it has been paid to the correspondent bank, it can repudiate or correct the credit, when it is ascertained the collection has not been made, on taking prompt measures to notify the customer of the mistake, so soon as the fact is made known to the bank giving the credit. Even where the mistake was not discovered for a considerable time—when the depositor's book had been balanced several times in the meantime—yet the bank so making the mistake was permitted to charge the customer therewith. *Mechanics' Bank v. Earp*, 4 Raul, 384.

415. A bank may open an account with a married woman, and may, as a matter of course, pay her checks and treat her in all respects as a *femme sole*, unless it has actual knowledge of the fact, or good grounds for believing, that she is a married woman, even though the funds deposited belonged to the husband. It will be protected in thus dealing with her and paying her checks, until duly notified that she is married and of the true ownership of the funds. This is on the principal that, where a husband suffers his wife to deal with his funds just as if they were her own, he must suffer the loss, and not the bank, unless knowledge of coverture is brought home to the bank. *Dacy v. New York Chem. Manufacturing Co.*, 2 Hall, 550.

416. If a married woman is doing business for her own account, with the consent of her husband, or has funds of her own separate estate, and keeps them separate from the funds of her husband, by his consent or knowledge, the bank can then deal with her and pay her checks, although it has knowledge that she is a married woman.

417. Where money is advanced by a bank on the strength of a bill of lading attached to the discounted paper, this gives the bank constructive possession of the property represented by the bill of lading, and the bank can claim the property against all the world, and it is not obliged to have the papers registered in the county clerk's office, like a chattel mortgage. It occupies the position of a mortgagee in

possession of mortgaged chattels, and can maintain trover or replevin against the party to whom the same was consigned.

418. The consignee holds it as bailee for the bank, and will not be permitted to hold the property for payment of any balance due him from the consignor on general account. *First National Bank of Cincinnati v. Kelly*, 57 N. Y. 34; decided 1874.

419. Shareholders in the stock of the bank have rights that must be protected by the directors; in truth, they are the parties most interested in the proper administration of the affairs of the corporation. They have a right to see that its funds are properly handled, and that prudence and honesty are used in the management of the affairs of the bank; and, should the directors be guilty of any fraudulent act, violate any provision of the charter, or willfully do any act that will bring loss to the bank—as in discounting notes in excess of the amount allowed by law, or declaring a dividend out of the capital of the bank instead of out of its earnings, or engage in any speculation or enterprise not within the scope of banking business—the shareholders have a right to hold the directors, or any one of them, liable personally for the injury thus inflicted upon their property. *Morse*, p. 451.

420. A question, which has given rise to no inconsiderable amount of discussion and been attended with some diversity of judicial opinion, as well as causing much perplexity to text-writers, is the right of the holder of a check drawn by a depositor who has funds in the bank sufficient for its payment, and who has not countermanded the payment at the time of its presentment, to hold the bank liable for its refusal to pay when so presented.

421. Mr. Morse, in his work on banking, answers the question, and with some plausibility favors the view that such liability exists, upon the ground of priority of contract between the holder of the check and the bank—that when the relation of bank and depositor was created, the bank undertook to pay all checks of the depositor so long as he has funds subject to his order; and this undertaking on the part of the bank, by virtue of the usage and custom of the banks, raised an implied agreement with the holder of the check that the bank would pay it. He even puts it stronger by saying, “We cannot but feel assured that, the bank in receiving the deposit, the depositor in drawing his check, and certainly not the least of the three, the payee receiving it as money—as actual cash—all alike in their respective acts contemplate and have perfect reference to a well-known usage of banks to answer the demands of the bearers of such documents, if the drawer’s credit is sufficient.” (Page 469.)

422. This is not the hypothesis or principle that the drawing of the check operates as an assignment of so much of the fund to the holder of the check; for it is well settled there can be no such assignment until there is an acceptance by the bank. It is not like the rule that operates when a party draws a bill or draft on a person who has funds in his hands for that purpose. In their case, it would be an assignment from the time of notice to the drawee. But it is sought to be placed by him on an entirely different principle—the one above mentioned—upon the agreement which is implied on the part of the bank when it receives funds on deposit subject to the order of the depositor, that it would pay out those funds whenever ordered, and that from the



nature of this contract, and the usage of banks, the holder becomes a party to the contract, and has a right of action against the bank for the amount of the check; not that the drawer and holder both can sue the bank for the same fund in case it refuses to pay. The drawer can also sue, but his will be an action for damages for injury to his credit for not paying his check. The holder, an action for the money itself.

423. Such is the reasoning, and such the conclusions of that learned author. Since the publication of Mr. Morse's book, however, two important cases have been decided, which have practically settled the question, and settled it in opposition to the views so warmly advocated by him.

424. The Supreme Court of the United States have met and decided the simple, naked question, that the holder of a check, before certification or acceptance of it by the bank, has no right of action against it; saying, there is no privity between him and the bank; it owes a duty, to wit: to pay his checks, when in funds to do so, to its customers; and he can maintain an action against it for refusing, improperly, to do so, but it owes no duty to the holder of the check, until it has by its own voluntary act created one; *i. e.*, by certifying the same, or by charging the drawee with the amount thereof. *Bank of Republic v. Millard*, 10 Wall. 156.

425. Otherwise, say the court in this case, "the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons at the same time." This case was not complicated with any extraneous facts. The single question raised and decided by the court was the one above stated.

426. The still more recent case of *Seventh National Bank v Cook*, 73 Penn. St. 483, decided in 1873, cites, with approval, the foregoing case. And since the authorities in this country, prior to those two cases, were not settled on this question, it is probable that the weight of those two eminent courts will induce other courts to adopt and follow their reasoning. The better opinion, therefore, in the present state of the law, would seem to be that the mere holding of a check gives no right of action against the bank, to the holder thereof.

427. The depositor or customer of a bank has his rights, which accrue as the relation once begins. He has a right to examine the books of the bank as to the condition of his account, to demand that the condition of his account be not disclosed to any one; to insist that the bank continue in a usage or the ordinary course of dealing with him that once existed; *provided*, such usage was a proper one.

428. He has a right to sue the bank when it pays his checks in counterfeit coin or paper. The right is to require the bank to pay his checks, and they are not *paid* if counterfeit coin or paper is given. And he has a right to sue the bank for damages if it refuses to pay his check, when he has money to his credit with the bank, sufficient to pay with.

#### DUTIES OF BANKS.

429. Although the relation of a bank and its depositors is in many respects that of a debtor and creditor growing out of a contract, yet, in some aspects, it differs from the relations existing between debtor

and creditor growing out of an ordinary contract. It is not a relation of trustee and *cestue que trust*, as is generally the case where a party deposits funds with another to hold in a fiduciary capacity.

430. So an arrest of the banker cannot be had in those States where the debtor can be arrested for certain classes of debts, when he fails to pay over the money placed in his bank as an ordinary deposit.

431. On the same principle a banker can be discharged in bankruptcy from his debts due depositors, as in law the debt is not regarded as having been created in a fiduciary capacity. *Buchanan Oil Co. v. Woodman*, 4 N. Y. Supreme Court Rep. 193; decided 1874.

432. When the relation of depositor is once created it is done upon the implied understanding that the bank will pay out the funds whenever so instructed by the depositor, and it becomes the imperative duty of the bank so to do, whenever the depositor instructs it in writing, either in the ordinary form of a check or in any explicit way, so long as it has any funds of the depositor to his credit.

433. The bank can pay out such funds upon a verbal order of the depositor, but the risk of the bank would be to make the necessary proof that it was paid on a verbal order, should it come into dispute. *Watts v. Christie*, 11 Beav. 546. It is the safest way for the bank to pay out the funds of the depositor only on written orders, written without ambiguity as to the amount, and showing to whom it should be paid and where.

434. On account of the delicate relations that exist between the bank and its customers, occupying in one sense, as before explained, the relation of a trustee of funds—to be held for the convenience of its customers—and also on account of the great facilities the officers of the bank have for committing frauds—it is the duty of the directors to keep a far greater supervision over the affairs of the bank than is encumbent upon directors of other corporations.

435. The directors of the bank become, in their relation to the customers, the bank itself, and are held responsible to the community for the doings of the bank and its agents, and it becomes their duty to so watch the doings of its officers that no one can long continue in acts of dereliction without their knowledge.

436. The very nature of the office of director is one of watchfulness, and they are supposed to become almost daily cognizant of each day's doings. And where they entrust an officer with functions which properly belong to him, or where they suffer a certain officer to assume certain functions not properly within the line of his particular duty, and the officer abuses the trust, the courts will hold that the directors have made him their agent, and hold them liable, in their individual capacity, for the acts of that officer. *Caldwell v. Nat. Mohawk Bank*, 64 Barb. 334; *United Society of Shakers v. Underwood*, Ky. Court of Appeals, 1874.

437. And the courts will not permit the directors of a bank to say they had no knowledge of the derelictions of its officer, or that he had assumed functions outside his peculiar line of duties, if any mischief should be thereby created, for the reasons above stated. It is their duty to keep so watchful an eye over the doings of each officer that the courts will infer they have actual knowledge of his acts. And it



is for these reasons that bank directors are held to the fullest knowledge of any transactions that take place in the bank.

438. Of course, should the officer do an isolated act, outside of his regular function, the bank is not bound; but the act must not be repeated so often that it may be construed into a usage, which the directors in doing their duty are bound to take notice of.

439. Where any officer in any way exceeds his authority or does an illegal or fraudulent act, which may not necessarily bind the bank, or which may cause a forfeiture of the charter, in case it should be in any way ratified by the bank, it becomes the duty of the directors, so soon as the fact comes to their knowledge, at once to repudiate the act, to refuse to receive any benefit therefrom, and to undo the transaction, if it can be done without great injury. And if the act has gone so far it cannot be repudiated or undone, then it is their duty to repair the injury so far as it lies in their power.

440. It is also the further duty of the directors at once to remove the officer who has thus transcended his authority or done the illegal or fraudulent act. *Bank Commissioner v. Bank of Buffalo*, 6 Paige, 497.

441. But when the directors neglect their duty in the supervision of the acts of the officers of the bank, and permit, for a long time, some one officer, the president or cashier, for example, to manage the whole business or one general branch of it, though the business properly belongs to another officer, yet the acts of that officer who is thus allowed to manage will bind the bank, so far as outside parties are concerned, unless the statute or charter of the bank positively prohibited him from doing that act. Of course, the application of this principle only applies to parties dealing with the bank who are innocent holders for value of paper received from the bank through their officers, or who are ignorant that he transcends his authority.

442. The principle being that, when the bank in this way makes him its general agent, his acts will bind the bank in any act the bank itself has power to do. *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. 334.

443. One of the most important features in the business of banks is that of making discounts. And it is the exclusive province of the directors to superintend all discounts. In fact, as this power is delegated to them direct from the Legislature, as we have already had occasion to remark, they cannot delegate it; they cannot part with it or invest any officer or officers with it, if they wished.

444. They may instruct the cashier or president or any officer to make a certain discount, or to allow a certain class of paper to be discounted, but the power thus given must be limited to the customer to the amount of discount taken, to the time, etc., and the officer must follow specifically the instructions given him. This is the utmost power the directors can delegate. In fact, the discount thus ordered is regarded as the act of the directors.

445. Of course, the directors can select a discount or loan committee, but the general management of discounts is the duty, and must be under the direct control of all the directors. *Bank of United States v. Dun, C. Pet.* 51; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

446. By reason of the trust relation which the director occupies to the bank, it becomes his duty not to take any position or use his influence in any way that will be prejudicial to the bank. In all questions that come before the board, which may affect him personally, it is his duty not to vote and to take no part in the discussion of the question.

447. Where there is no direct prohibition, the bank can make a loan to a director; and where the question of discounting his paper is being discussed, it is the duty of the board to exclude him entirely from its deliberations, and to scrutinize more critically and more severely the matter under consideration, for reasons that are obvious, from the relations which he occupies, and because the action of the board itself will be severely scrutinized should it come before the courts. Any irregularity in such proceedings may render the bank liable, even to a forfeiture of its charter. And the same mischief will follow where the directors permit the cashier to make the loan and do not examine his acts, as it is their duty to do. *Bank Commissioner v. Bank of Buffalo*, 6 Paige, 497.

448. And as the above is the true rule, so far as a director is concerned, the same duty devolves upon the board of directors, where a firm is interested or makes an application for a loan, of which firm one of the directors is a member; and the same restrictions apply.

449. From the very nature of the business of banking, the supreme control and management of the funds of the bank is with the directors. They have no right to use the property of the bank for purposes other than those necessary to carry on the legitimate business of banking; and it is their duty to conduct the affairs of the bank in the manner, according to their best judgment, most conducive to an increase of the profits and an enlargement of the legitimate business of the bank.

450. It is their duty to so use the corporate funds as to increase its capital by any legitimate means not prohibited by their charter, and not inconsistent with the business of banking.

451. They cannot use the property of the corporation for charitable purposes; nor can they give it away; nor subscribe to any such object, except upon authority given them by the stockholders. They are trustees of the property for the benefit of the stockholders, and if they violate their duty in this respect, it becomes a direct violation of a trust, and they will be individually liable for a breach of the trust. *Frankfort Bank v. Johnson*, 24 Me. 406.

452. A bank, being an artificial body, can only act and speak and know through its organs or agents, and these organs are the officers and directors. The latter are virtually the bank, and it is their duty to act upon any question that pertains to the interests of the bank which comes to their knowledge. And the following question becomes an important one: When does the bank have notice of any fact which concerns it?

453. It may be said that any fact which comes to the knowledge of a director, while in the discharge of his duties, is to a board of directors, is knowledge to the bank. Especially is this so where the board of directors discuss any question while in session. And knowledge received by one board of directors is conclusively presumed to be



possessed by its successors. *Mechanics' Bank v. Seton*, 1 Pet. 299; *Fullton Bank v. New York and Sharon Canal Co.*, 4 Paige, 127.

454. But knowledge obtained by a director not in his official capacity, but in his private individual character, is not knowledge of the bank. It is difficult to determine, at times, when the director receives the information in his official or individual capacity. Each case must depend on its own circumstances. A sure test is this:

455. Had the officer to whom the knowledge came any duty to perform in regard to the matter? If he had, then unquestionably his knowledge will be considered knowledge of the bank. *Fullton Bank v. New York and Sharon Canal Co.*, 4 Paige, 127.

456. As has before been said, it is the duty of the bank to pay all the checks drawn on it by the depositor, so long as it has funds to his credit. This was the condition upon which the relation of bank and depositor was created, and the duty of the bank is to pay such checks in the order in which they are presented, until the funds of the depositor are exhausted, although it may know that, as a matter of fact, several checks are outdrawn by the depositor.

457. It must not take upon itself the duty of distributing the funds *pro rata* on all the checks presented.

458. When several checks from the same depositor are presented through the clearing house, and the sum of them all exceeds the balance of the depositor, it is the duty of the bank to refuse the payment of any of them.

459. It cannot say which it will pay and which refuse, nor to pay *a pro rata* on all of them. *Morse on Banking*, p. 248.

460. As has before been said, under the head "Rights of Banks," the bank has the right to refuse to pay a check drawn for more funds than the depositor had to his credit. *Murray v. Judah*, 6 Cowen, 490.

461. But where the check is presented to the bank for a larger amount than the drawer has to his credit, and the holder of the check is willing to take the amount to the credit of the drawer, and credit it on the check, and surrender the check to the bank, and get a statement from it as to the amount received, the bank is bound to make the payment—upon the principle that the drawing of the check by the depositor for an amount greater than the balance to his credit, and demand of the same by the holder of the check, and his willingness to receive the balance, is an assignment of the whole balance, and the payee of the check has a right to it. *Bromley v. Com. National Bank of Pennsylvania*, as reported in vol. 5, Chicago Legal News, p. 51.

462. According to the principle of this case, the bank is bound to make this payment, where the check is greater than the balance to the credit of the depositor; and, if it should refuse, and should pay a smaller check, subsequently presented, or if the depositor should draw out his funds, it would become liable to the holder of the first presented check for the full amount of the deposit. This doctrine is somewhat new and opposed to adjudicated cases in other States, and to the *dicta* of Mr. Morse, on page 257, and other leading text-writers on this subject, and is, perhaps, the latest adjudication on this point. It is also difficult to reconcile this case with the case of *Bank of Republic v. Millard*, 10 Wall. 156, and *Seventh National Bank v. Cook*, 73 Penn. 483.

463. It is the duty of the bank to refuse payment of a check drawn by a party who has subsequently become a bankrupt, so soon as it learns definitely that the drawer has filed his petition or been forced into bankruptcy, whether before or after adjudication.

464. The bank cannot refuse to pay the check of a party who has simply committed an act of bankruptcy; as, for instance, giving a fraudulent preference or stopping payment, etc.

465. And the same duty is imperative when the bank learns that the drawer has deceased; its duty is to refuse to pay the check.

466. But in either case, that of bankruptcy or death of the drawer, if the bank should pay the check before it has actual notice of the fact, it will be protected; the same is true if a check is paid after a general assignment for benefit of creditors.

467. Should, however, the bank be guilty of actual negligence in obtaining information of the bankruptcy, assignment or death, where the information was in its reach, it is doubtful if it would be protected in paying the check. In the case where the debtor and drawer of the check had made a general assignment for the benefit of his creditors before the check was presented, this question was directly settled in *Griffin, assignee v. Rice*, 1. Hilton (N. Y.) 184.

468. Where the deposit is made by several parties, not partners, as where the deposit is made by joint trustees, or where money is placed to the credit of A, B and C, not partners, it is the duty of the bank to require that the signature of all the parties owning the fund be signed to the check. So a check signed by one of several assignees should not be paid; all the assignees must sign. This applies equally to assignees in bankruptcy.

469. But where one of the trustees or assignees should abscond or become incapacitated to sign a check, a court of equity will order the bank to pay on the check of the remaining depositor.

470. And where checks are usually signed by one officer of a corporation and countersigned by another, but one of these names is wanting, payment must be refused, or the bank will be liable. If, however, the fund, after it is drawn on such an imperfect check, reaches the proper channel, the bank would be protected.

471. But a check, signed by one of several administrators or executors, would be sufficient authority to the bank to pay it. *Junes v. Stephenson*, 1 Moody & Rob. 145; *Stone v. Marsh*, Ryan & M. 364.

472. It is the imperative duty of the bank to know the signatures of its depositors. Should it pay out money to an innocent holder of a forged check it can never recover the same, nor can it charge the depositor the amount paid on the forged paper; the loss must fall on the bank. *Levy v. Bank of United States*, 4 Dall. 234; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141.

473. The bank is held to the strictest diligence; no excuse will avail it; it cannot say it was a mistake; it cannot plead that it was a well-executed forgery. If the signature is not genuine, that is sufficient.

474. Even where the bank should merely enter the amount of the check to the credit of the holder, according to the decision of the Supreme Court in the case in 4 *Dallas*, cited above, this was a payment of the check and the bank was not allowed to recover from the holder.



475. A check, altered as to the amount to be paid thereon after the depositor signed it, is as much a forgery as if the signature was forged.

476. But the above strict rule, as to the duty of the bank to know the signatures of its depositors, does not apply where the body of the check has been changed, in the case where the drawer has written the check so carelessly that it can be altered as to the amount by adding to or changing the figures or words, in such a manner that it would not attract attention; the loss in that case must be that of the drawer.

477. For instance, he may sign a check in blank, and it may be filled up for any amount, and the bank will be protected in paying it, unless it had its suspicions aroused in some way.

478. The handwriting of the body of the check may be different from the signature, for a drawer may sign a check filled up by his order—the bank is not put on inquiry from this circumstance only.

479. If the check is signed before it is properly filled up, and the filling up or alteration is afterwards made, the loss falls on the drawer, *provided* the alteration is done so as not to attract attention; and the bank will be protected when it pays a check which appears properly filled up when presented to it for payment.

480. But should the bank have reasonable grounds for suspicion that the filling up of the check was improperly made, or if the alteration was done in a manner so awkward as to arouse the suspicion of the bank officer, in the exercise of proper diligence, then, if the bank should pay the check before ascertaining from the drawer whether the alteration is made with his consent, it would be held to the same strictness as if the signature was forged. *Morse on Banking*, p. 302.

481. The payment of a raised or otherwise altered check, as between the drawer and bank, subjects the bank to suffer the loss. But, as above said, if the check is drawn so carelessly that it can be changed without arousing suspicion, then the loss must fall on the drawer who signed a check so carelessly. *Goodman v. Eastman*, 4 N. H. 455.

482. But a payment of a raised check, as between the bank making the payment and the bank from whom it was received, the rule is otherwise.

483. In *Espy v. Bank of Cincinnati*, 18 Wallace, 604, the facts were these: A broker brought a check to the bank on which it was drawn, and asked whether it was good, that he was about to purchase it from a stranger and wanted to satisfy himself that the check was good. The proper bank officer examined it and said, "It is all right, send it through the clearing house." The broker sent it through the clearing house and the bank paid it. After payment the bank discovered that it was altered, and demanded back the money and brought suit for it. The Supreme Court of the United States held that the bank was entitled to recover, stating that the bank on examining the check the first time did not seem to have had its attention directed to anything but the genuineness of the drawer's signature and the state of his account.

484. The court would have probably held differently had the bank certified in writing that the check was good, as this would have been evidence that the whole check was scrutinized by the bank and adopted as its own paper, especially if the alteration was of such a character that a careful examination would have excited suspicion.

485. So, where there is a doubt on the part of the bank, after it has paid the check, as to the genuineness of the signature of the drawer, and the check is shown to him, and he pronounces the signature to be his, and it nevertheless proves to be forged, the loss will be that of the bank: upon the principle that the bank is bound to know the signature of its depositors, and the right of the bank becomes fixed on payment of the check, and the answer of the depositor, given honestly, though erroneously, in an effort to aid the bank, does not alter its position or responsibility. Probably, however, if at the time the bank should inform the customer that it could save itself by prompt repudiation, if the signature is forged, he might then be estopped. *Morse*, p. 310.

486. The bank is bound to have regard to the amount written in letters on the check instead of the Arabic figures, where the two differ—in fact, the figures are not material to the check and may be wholly disregarded. *Smith v. Smith*, 1 B. I. 398.

487. By the common law, the obligation of the bank is only to pay out money on checks when made payable “to bearer.” But the custom has grown so universal to draw a check payable to the order of a certain person, and banks have so universally recognized the custom, that it is now binding on the banks to pay checks when drawn “to order.”

488. But it is an imperative duty of the bank to know that the signature of the person to whose order the check is made payable, and who indorses it, is genuine, and should the instrument be forged the bank is not exonerated by paying it.

489. The bank must satisfy itself the indorsement is genuine, and that the party presenting the check is the payee or indorsee, and may refuse payment until it is so satisfied; and it is its duty to hold sufficient funds to pay it, should it turn out that the party presenting the check is the proper party to receive the funds. *Holt v. Ross*, 54 N. Y. 473.

490. It may seem a severe responsibility to hold the bank to ascertain the genuineness of the signature of the indorser, and that the party presenting it for payment is the proper party to receive the funds, but the universality of the custom, and the acquiescence of the banks in the custom, makes it now a part of the contract made with the customer at the time he makes his deposit, that the bank will pay checks drawn “to order,” and the bank assumes the risk thereby created; and should the bank pay a check to any person not properly authorized to receive it, it thus being no such payment as will protect the bank, the true owner of the check can compel the bank to pay to him. *Seventh Nat. Bank v. Cook*, 73 Penn. 483.

491. However severely the duty may practically operate on the bank, yet it has undertaken it and must abide the consequences; and, where a check or draft is presented for payment by a payee or indorsee who is not personally known to the bank and has to be identified, it is not safe for the bank to take the verbal identification of the person who proposes to identify him, for then the bank could not hold him should it turn out that he was mistaken, but if he knowingly misrepresented the party's identity, the bank could hold him liable. The only safe course for the bank to pursue is to require the indorsement of a respon-



sible party to the paper before paying it to a stranger. *Merchants' Nat. Bank v. Sells & Co.*; decided by Circuit Court, St. Louis county, Mo. June, 1875.

492. When a bank accepts a check, or certifies it "good," it thereby enters into a new obligation toward the payee or indorsee, and the relation of debtor and creditor at once comes into existence between the bank and the holder of the check. The bank thereby admits the genuineness of the signature of the drawer and the right of the holder to receive the funds.

493. It is then bound to retain sufficient funds of the drawer to pay the check whenever called upon, as this virtually transfers the fund from the credit of the drawer to that of the holder of the check, and the bank cannot be heard to say the drawer had no funds. *Merchants' Bank v. Nat. Bank*, 10 Wallace, 604.

494. Nor can the bank then avoid its liability to the holder of the check, even should the signature of the drawer be forged, unless the holder knew it was forged.

495. It is the duty of the bank not to allow a depositor knowingly to misappropriate funds which are to his credit as trustee or in any other fiduciary capacity—as not to allow him to check against the trust fund, to be used in placing same to his individual credit, or for other individual purposes. Of course, if the bank had no knowledge that the trustee intended to misappropriate it, would be protected in paying his checks. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Van Allen v. Am. Nat. Bank*, 52 N. Y.; decided 1873.

496. So, where an agent or attorney in fact uses the funds of his principal in the discharge of his private debt to the bank, or to any other person, and there is any possibility of fixing the bank with collusion or knowledge of the transaction and breach of trust, the bank will be liable for its misappropriation.

497. The duty of the bank only goes to the extent to see the check is signed so as to correspond exactly with the name and office in which it was deposited, and if satisfied on this point, it will be protected in paying it, unless it should have knowledge of the intention to misappropriate it. For instance, if the deposit was in the name of A, as trustee or as agent for B, the check should be signed, "Trustee for B," or, "Agent for B"; and not "Trustee," or "Agent."

498. It is the duty of a bank to hold a fund, about which there is a dispute as to the true ownership, until the question can be settled as to who is the proper party to receive the fund.

499. Without any notice of another claimant the bank's duty is to pay the fund on the check of the party in whose name the deposit was made, and it will be protected; but after the controversy arises concerning a claim, the bank should hold the fund and not pay to either claimant, after it has reliable information the controversy has arisen, until the matter is settled. *Farmers' and Mechanics' National Bank v. King*, 57 Penn. 202.

500. So, if the bank is garnished, it should not pay out the fund to any person until discharged, unless it is secured by a bond of indemnity.

501. The bank can pay out the fund to either claimant, if the claimant will properly indemnify the bank, so that it will suffer no loss in case the party receiving it is not the proper party.

502. If the deposit is made by a party in an official capacity, his successor in office is the proper party to withdraw the fund; or, if the deposit was made by the party as executor or administrator, the administrator *de bonis non* of the estate of the prior deceased is the proper party to draw out the fund, and not the administrator of the administrator. *Morse*, p. 276.

503. Usually, the president of a corporation is not the proper officer to check out its funds on deposit in a bank, unless usage to that effect is shown, and it is the duty of the directors to see that the funds so deposited by a corporation are designated in such a manner that only the proper officer of the corporation can check them out.

504. Should they permit the funds of the corporation to be deposited in a manner which does not clearly show that these were corporation funds, and so as to lead the bank where they are deposited into thinking they were the individual funds of the president, and this latter bank should allow him to withdraw the funds on his individual check, and if he should misappropriate them, the bank of deposit would not be liable; the loss will fall, and properly, on the bank guilty of making the deposit in so loose a manner as to mislead its correspondent. *Fulton Bank v. Sharon Canal Co.*, 4 Paige, 127.

505. Also, where a bank receives paper for collection and receives the proceeds of it, it is bound to pay to the party or bank from whom it received it for collection, and should do so at once, either by voluntary remittance or upon order.

506. But should notice be given to the collecting bank that another is the true owner of the paper, and this notice is received before it pays the money over to the party from whom it received the paper for collection, the bank is bound to the true owner. *Union Bank v. Johnson*, 9 Gill & Johns, 297.

507. The bank is under legal obligations to the drawer to pay all checks drawn by him against his balance at any time when called upon after the check is made payable.

508. Checks are payable at any time after their dates; and the drawer can ante-date or post-date them; the former are payable immediately, but the latter not until the day they are dated, and are not entitled to days of grace. It would be highly improper for the bank to pay them before the day of their date.

509. Should the bank see proper to pay it before its date, it does so at its own risk, for it is not ordered by the drawer to pay before. In the meantime, the drawer may revoke or countermand its payment, which he has a perfect right to do, or he may draw out all his funds before the day of its date. *Mohawk Bank v. Roderick*, 10 Wend. 304; *Harker v. Anderson*, 21 Wend. 372.

510. And a post-dated check that falls due on Sunday or a legal holiday, is not payable the day before, like a bill or note, but presentment must not be made until the day after, as the bank is not bound to pay until then; and a demand made and refusal had on the day before, will excuse an indorser, unless the error should be corrected by a second demand, made on the day after Sunday or the legal holiday. *Morse*, 315; *Salter v. Burt*, 20 Wend. 205.

511. An important feature in the business of banks, is that of receiving checks, notes and bills of its customers, or others, for collection.



When a bank undertakes to make collections, either upon checks, notes or bills, its duties to its customer begin. The power to assume these duties is inherent in all banks, and become part of its every day business. And when the bank undertakes the collection of any paper, it is incumbent upon it to attend to it in the best possible manner for the interest of its customer.

**512.** It is not bound to institute suit upon any paper indorsed to it for collection, although the indorsement is done in such a manner as to vest it with the legal title, unless specially instructed to sue. It can sue, however, in order to collect, if it wishes.

**513.** In case it does undertake to collect by suit, the bank is bound to employ the proper legal agents to collect it; should it be negligent in the selection of its agent, and loss should follow by reason of the negligence, as in case of entrusting the collection to a notoriously inefficient or untrustworthy attorney, the bank would be responsible to the owner of the paper.

**514.** The general duties which devolve upon a bank undertaking collections, are to be determined by the character of the paper and the place where it is made payable. For instance, the duties may be simple where the paper is to be collected in the same town with the bank receiving it; it may only have to present it to the bank where payable, or to the drawer or acceptor, and if not duly honored, have it protested. *Morse*, p. 325.

**515.** The general doctrine may be said to be, that when a bank undertakes to make a collection, it is its duty, whether charging commissions or not, to use and exercise reasonable skill and diligence in all the necessary acts incident to the collection, and will not be allowed to plead want of consideration. The keeping of the customer's discount, or the expectation of being able to hold the money until called for, is sufficient consideration. *Smedes v. Utica Bank*, 20 Johns. 372.

**516.** The bank where the paper for collection is deposited, whether it be a bank at which the paper is payable or not, is the agent of the holder or depositor, and not of any other party. Its duty consists in acting for the interest of the depositor and to collect the amount due upon the paper, or ascertain by practical effort that it is not collectable within its range of making collections. Those liable upon the paper by paying the amount due upon it to the bank holding it for collection and taking it up, have done all that is necessary to protect themselves. They are not required to see that the money finally reaches the hands of the party entitled to it. *Ward v. Smith*, 7 Wall. 447.

**517.** It is its duty to make the presentment demand, and give notice of the dishonor of the paper, and perform all the necessary acts to hold the indorsers or drawers, in accordance with the laws of the place where the same is made payable. Should the paper come from a distance for collection, it is still its duty to follow the laws and customs of the place where made payable, in the presentment demand and notice, unless the correspondent gives instructions otherwise, and then it is bound to follow such instructions. *Bosup v. Nininger*, 5 Minnesota, 523.

**518.** Where the bank deviates from the customary mode of making collections, as where it sends paper to a distance by private messenger, instead of by mail or express, or where, in cities having a clearing

house, it presents the check over the counter of the drawee's bank, and the payment is refused, whereas if it had gone through the clearing house it would have been paid, all these and similar modes are agencies employed by it, and for the default of the same the bank is bound. But if the deviation is by reason of special instructions from the customer, the rule is different.

519. It is the duty of the bank to select a proper agent, when it is necessary to have the services of one, such as a notary, so that all the details incident to proper demand and notice will be properly performed.

520. The bank may make itself liable by selecting an improper notary, who, from neglect or ignorance, causes loss to fall upon the owner of the paper. If, however, it selects a proper notary, as, if it selects one that is ordinarily employed to do its own protesting, this would be strong evidence that the bank did its duty. The duty of the bank would have been done, and then, if such a notary should commit an error, the bank would not be bound. But if the bank has a notary in its employ on a salary, he becomes the agent of the bank, and it is responsible for all his errors and negligence. *Stacy v. Dane Co. Bank*, 12 Wis. 629; *Geihard v. Boatmen's Sav. Inst.*, 38 Mo. 60; *Citizens' Bank v. Howell*, 8 Md. 530.

521. Where the instrument received for collection is a check, the duties of the bank become somewhat more complicated. *Morse*, p. 326.

522. The bank becomes the agent of the depositor of the check for collection, and it is bound to present it within a certain time, if the same is drawn on a bank in the same place. Usually this time is until the close of banking hours on the business day next following that on which the bank comes into possession of the check. *Hare v. Heutz*, 10 C. B. 65; *Boddington v. Schleuber*, 4 B. & A. 752.

523. Of course, circumstances such as the usual custom of the bank, or special instructions from the depositor, may modify or change this rule. The depositor has the right to suppose that the bank will do its duty and use the established system of the place, whatever that may be, in making presentment.

524. The bank's duty is to present the check to the drawee bank in due time. If there is a clearing house in the place where the receiving bank is situate, banks generally use this mode of presentment, as this is a sufficient presentment to the drawee bank. But, should the depositor give other instructions as to the time and mode of presentment, as that it should be presented at once, and not wait for the delays incident to the clearing-house system, it is the duty of the bank to follow instructions; otherwise, if loss should follow, it would be responsible.

525. And, following the above doctrine, a question of very great importance to banks presents itself, governed by the same principle—a question on which the courts of the different states have held opposite opinions. It is as to the liability of the bank that receives the paper for collection, when it is made payable in a place other than where the receiving bank is located.

526. The courts of New York and Ohio seem to be fixed in holding that the receiving and transmitting bank is responsible for all the acts of its correspondent bank, and if the money is lost in any way, the receiving bank is responsible to the owner of the paper; or if the



bank to which the collection is sent is guilty of any negligence in having proper demand made, or fails after the money is received, the transmitting bank is responsible. The decisions of these courts are based on the old doctrine, that the principal is responsible for all the acts of its agents, whether banks or notaries; that the bank undertook the collection of the paper, and can select any means to accomplish this it may see fit, and if it sees fit to collect through subagents or other banks, it makes its own selection of these agents, and should be held for the neglect or failure of these agents to do their duty; that if it does not wish to take this risk upon itself, it can refuse the collection in distant places, or make a special contract to limit its liability. This reasoning is not without force, but as New York and Ohio are alone in this ruling, it cannot be considered as an established doctrine, and is opposed by the weight of authority. Of course, in these two states it will govern, but the doctrine, we think, is not sound, and will not prevail elsewhere. The leading cases in New York and Ohio on this point are—*Allen v. Merchants' Bank*, 15 Wend. 482, and 22 Wend. 215; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465.

527. But the other state courts before which the question has arisen, and the Supreme Court of the United States, hold to the doctrine stated above, *i. e.*, to the rule which governs a bank in the selection of a notary where the paper is payable in the place of the receiving bank, that the duty of the bank ceases with the selection of a proper notary. The reasoning is this: when a party deposits his paper in his own bank for collection, which paper is made payable at a distant place, he knows or is bound to know that the receiving bank, in order to do its duty in collecting has to transmit the paper to its correspondent at or nearest the place where the paper is payable, in order that the same may be duly presented for payment, and if not paid, due demand and notice can be given; for it cannot be supposed that the receiving bank would send its own agent or notary to the distant place, perhaps thousands of miles, to present the paper for payment, and if not paid to duly protest it. And it entered into the implied contract, made with the receiving bank at the time, that it should transmit the paper to its correspondent nearest to the place where the paper is made payable; that when the receiving bank so transmits the paper, the correspondent bank or its notary becomes the agent, not of the transmitting bank, but of the true owner of the paper, and is responsible to him for its neglect or defaults.

528. Of course, the receiving bank must not be guilty of any negligence in selecting an improper bank to which to transmit the paper. Some of the leading cases that hold this doctrine are—*Dorchester and Milton Bank v. New England Bank*, 1 Cush. 177; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Ætna Ins. Co. v. Alton City Bank*, 25 Ills. 243; *Bank of Washington v. Triplett*, 1 Peters, 25; decision by Chief Justice Marshall. And, in *Missouri*, in *Daly v. Butchers' and Drovers' Bank*, 56 Mo. 94—decided in March, 1874—the court reach the same conclusion after reviewing all the decisions in the other states. And, Mr. Morse, in his treatise, after going fully into the doctrine, comes to the same conclusion.

529. When the depositor leaves the paper for collection and gives the receiving bank any instructions as to its transmission or otherwise,

it is the duty of the bank, as we have said, to follow those instructions implicitly, as where the depositor instructs it sent in a certain way, as by express, and to a certain bank, and to be presented and payment demanded in a certain way—and if any loss should occur, the bank will not be liable, if it has followed those instructions.

530. But, where no instructions are left and where the laws of the place where paper is payable differ from the place from which it is sent, it is the duty of the bank, of its own accord, to transmit instructions to its correspondent as to the mode of demand and protest, to hold the indorsers—if it is necessary to do so in a manner different from the law or custom where the paper is payable, in order to hold some or all of the indorsers. *Allen v. Merchants' Bank*, 22 Wend. 215.

531. Where the collection passes through several banks, each is bound to the holder for its failure to transmit to its next correspondent, and is liable to a suit direct from him. *Lawrence v. Stonington Bank*, 6 Conn. 521.

532. After the bank receives paper for collection, it assumes certain obligations to the holder, which it must attend to promptly. It must at once forward the same to its correspondent at or near to where the drawer or acceptor lives. Should the paper be returned to it unpaid or unaccepted, it is its duty to at once notify the holder of the same. *Wingate v. Mechanics' Bank*, 10 Burr. 107.

533. If the paper is to be accepted, it is the duty of the bank to procure the acceptance in accordance with the terms of the draft and by the party upon whom it is drawn, and the acceptance must be obtained unconditionally and absolutely—as, for instance, the bank should not permit the drawer to accept in words which changes the form of the draft, to make it payable at another time or in any kind of payment than money, or to be accepted by a person other than the drawee.

534. And, if it should take an acceptance other than as directed, it should at once notify the holder, with the view to his recognition of the same, which, if had, will exonerate the bank from liability. *Walker v. Bank of State of New York*, 9 N. Y. 582.

535. In the absence of any special agreement or instructions, the usage and custom and law of the place where paper is to be paid must prevail, and the bank can in safety use no other course.

536. Where a bank issues its notes and bills, which circulate as money, and any one comes into possession of the same for value, the relation of debtor and creditor exists, and the bank is bound to accept its own notes and bills in payment of debts due it, however much they may have depreciated.

537. The debtor of the bank has a right to set off its bills against any debt the bank may hold against him.

538. But, should the bank become insolvent, and be placed in the hands of a receiver, then the debtor of the bank can only set off the bills of the bank for their face value when he had come in possession of them, prior to the insolvency of the bank. *Bruyn v. Receiver*, 9 Cowen, 413 n.

539. The above rule, of course, has full operation where the note or paper held by the bank is made payable in its own bills, no matter how much the bills may be depreciated in value. *Morse*, 403.



540. Where a party—the *bona fide* holder of bills of a bank—should lose them by fire, and be in a condition to fully describe them and prove their destruction, it is the duty of the bank to make up the loss—nay, it is bound to do it; but it is otherwise, if the bill is accidentally stolen or lost, for, being negotiable in this case, the finder is entitled to the bill, or may use it. *Morse*, p. 408.

541. Where it is sought to hold the indorser of a check, a different rule prevails from where it is sought to hold the drawer of it. In seeking to hold the drawer, a demand for payment is good, within almost any reasonable time, unless, indeed, the drawer can show that he has been injured by the delay—as, for instance, that the drawee-bank failed. But, in seeking to hold the payee or indorser, the check must be presented, and notice of non-payment given with the same diligence as is required in notes and bills of exchange.

542. This subject is of such great practical importance that we shall quote quite at length from a leading case on this topic. The opinion is that of Judge Bronson, in *Smith v. Jones*, 20 Wend. 192:

543. "Checks are governed, in several particulars, by the same rules that prevail in relation to inland bills of exchange, payable either on demand or at a given number of days after sight. The holder can recover against the indorser only when he has used due diligence in presenting the check and giving notice of the demand and non-payment by the bank.

544. When the parties all reside in the same place, the holder should present the check on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same or the next succeeding day for presentment. It has been said that greater diligence is necessary in presenting checks for payment than is required in relation to bills of exchange, but I can see no good reason for it; what will be due diligence in one case will be due diligence in the other.

545. In an action by a second indorser of a check against the payee, laches on the part of the first indorser will not be presumed; if there was negligence on his part, it must be affirmatively shown by the defendant. So, where the second indorser has put the check *in circulation*, laches will not be presumed in a subsequent holder, where the bill was in circulation only four or five days after the second indorser parted with it before it was sent for presentment.

546. But, where, by the course of mail, the check may be presented *in three days*, and the holder, instead of putting it in circulation, *holds it in his possession* seven or eight days, he is chargeable with want of due diligence.

547. How long a bill or check, payable on demand or at a given number of days after sight *may be kept in circulation* before presentment without discharging an indorser is an unsettled question. Each case must be determined by its own circumstances."

548. The case at bar is one where a second indorsee of a check on receiving it *put it in circulation*, and not more than four or five days elapsed thereafter before it was sent for presentment, and the court held, in an action by him against the payee, that he was not chargeable with laches, there having been no evidence in the case but that

the indorsee became the holder of the check on the day it was negotiated by the payee.

549. It will be seen that the court drew a distinction between a holder who keeps the check in his possession for several days and one who puts it in circulation. In the latter case much more time is permitted to elapse before presentment without incurring the danger of laches.

#### LIABILITIES OF BANKS.

550. A contract to perform the duties of an office is implied by the party accepting. *Commonwealth v. Evans*, 74 Penn. St. 124.

551. In discussing the *rights of banks*, it will be remembered that the principle was stated that the bank received its powers from the statute law, direct from the Legislature, and as its business is a peculiar one, that it had no power to do any act, unless the power is expressly given or is necessary to the proper exercise of the powers so expressly given.

552. In making this statement, it must also be remembered that our meaning is, that no power is given the bank, either directly or by implication, to do any other act than what falls within the limits of business usually undertaken by banks; our meaning is not that the bank can do no other act for which it will be held liable—for there are many acts it may do and many contracts it may enter into for which it will be liable; for instance:

553. The charter of a bank may limit its issue of bills, and yet the bank may put forth a larger issue than authorized and be bound for the excessive issue, in the hands of a *bona fide* holder; also, there may be no power given a bank to engage in any other than a strictly discount business, yet should it receive paper for collection, which is prohibited by its charter, it makes itself liable to its customer, who was not aware of the limitation of its power.

554. Generally, a bank cannot become surety for a person; this power is not given in the charter and is not inherent to the powers of a bank; yet should it become an accommodation indorser and the paper comes to the hands of an innocent holder for value, although as a matter of fact the indorsement is illegal, yet the bank is liable as such indorser. *Morse*, p. 10.

555. But, where the holder had actual notice that the indorsement was for accommodation, or where there is anything in the appearance of the paper that will show it was for accommodation, then it is incumbent on the holder to prove that the bank received value for the indorsement, or that the directors knew and ratified the act of the officer making the accommodation indorsement. *West St. Louis Savings' Bank v. Shawnee County Bank*, U. S. Circuit Court, District of Kansas; reported in *Central Law Journal*, January, 1875.

556. And, as it will be shown in the proper place, the bank is liable for all acts done by its directors and officers within the limits of their respective duties; yet, should these officers exceed their authority, in entering into a contract, to the extent as to make an illegal con-



tract, yet the contract can be enforced against the bank by the party making it, should the bank do any act ratifying it.

557. Although the party could not recover on the paper itself, which is evidence of the contract, yet he may on the original consideration. As where the cashier borrows money without authority and gives a note of the corporation for it, the contract itself may be illegal; the note made without authority, is illegal, but the creditor can hold the bank for the money had and received, if the bank actually used the money and had a right to borrow, in any way, money for its use. *Utica Insurance Co. v. Scott*, 19 Johns, 1; *Curtis v. Leavitt*, 15 N. Y. 9; *Boisgerard v. N. Y. Banking Co.*, 2 Sandf. ch. 23.

558. Much more is the bank liable where paper is made by any of its officers, not in the formal way authorized, and it is negotiable and comes into the hands of a *bona fide* holder, without notice, unless the charter absolutely forbids the bank to issue such paper. *Morse*, p. 13.

559. The directors are the only persons authorized to make a contract that will be binding upon a bank, with a few exceptions, to be hereafter noticed. But the liability of the bank is not fixed until the contract is signed by the president or cashier, or both, as they only have power to bind the bank with their signatures, and are not authorized to sign any contract not previously made by the directors, as the directors only can borrow money to increase the capital of the bank, and they only can buy and sell real estate (if the purchasing and selling is in the province of the bank at all). But the contract in either case is not perfected until the proper officers sign the same, and not until then does the liability of the bank begin.

560. And all contracts signed by the president and cashier, unless in pursuance of instructions from the directors, will be invalid in hands of any party knowing the irregularity. *Gillet v. Campbell*, 1 Den. 520.

561. But, should a contract or negotiable paper, duly executed by the president and cashier, who had no authority to execute the same, come into the hands of an innocent holder for value, the bank would be bound. And the cashier can bind the bank by his check or other paper given for money to meet the ordinary exigencies of the bank; but not to borrow money to increase the capital of the bank. *Merchants' Bank v. Nat. Bank*, 10 Wallace, 604.

562. All banks are liable, in the same way as individuals, for a violation of the usury laws; and the contract into which usury enters is governed by the laws of the State where made or to be performed; and the bank is liable to all the penalties imposed for taking or contracting for usury, either by the State or United States statute.

563. In some states the contract is absolutely void; in others it prevents the recovery of all interests, while in others, of only the excess of legal interest. Besides, the bank may be liable for the forfeiture of its charter. But should the bank attempt to enforce such a contract, the debtor cannot at all times escape the payment on the ground that the contract is illegal. He can only claim the benefit of the law against usury, according to the law of the place where the contract was made. *Bank of the United States v. Waggner*, 9 Peters, 399.

564. As before said, where the taking of a greater than legal rate of interest is done by the bank, in the shape of discounts, it is not usury, strictly speaking. One of the direct or inherent powers of a bank is that of discounting paper; and discount means to reserve interest in advance. So, where the bank in this way gets more than the legal interest, it is not liable to the penalty of usury. *Morse*, p. 16.

565. But, if the bank should demand and receive an excessive rate of discount for the purpose of avoiding the usury laws, it would nevertheless be liable to all the penalties for taking usury. *Ibid.*

566. Where one of the penalties imposed by the statute or law of the land upon the banks for taking usury, is the forfeiture of its charter, this can be enforced only at the instance of the State, and only when the bank willfully demands or receives usury.

567. Where a cashier or any other officer of the bank does the illegal act of taking usury, the bank is not liable to a forfeiture of its charter for this act, unless it was done with the knowledge of the directors, or when subsequently sanctioned by them, or unless the directors failed to repudiate the act so soon as it came to their knowledge.

568. The presumption of law is, that the corporation does not authorize its officers to do an illegal act, and when either one of them does an illegal act, and it is not shown that the directors knew or sanctioned it, the bank is not liable for the penalty. But where the illegal acts are done frequently, or even habitually, the presumption will then arise that they were done with the knowledge of the directors. *Clark v. Metropolitan Bank*, 4 Duer. 241.

569. Any violation of the State law or provision of its charter knowingly committed by the directors will subject the bank to a forfeiture of its charter. And the directors of a bank, unlike the directors of any other corporation, are held to a strict accountability for watching the acts of its officers—and may even be held individually responsible where the officer is guilty of illegal acts which they might by proper diligence have discovered and prevented. *Agricultural Bank v. Robinson*, 24 Maine, 274; *United Society of Shakers v. Underwood*, Ky. Court of Appeals, 1874.

570. *Mr. Morse*, page 22, says: "Generally it may be said that any violation, willfully or knowingly committed, of any material direction or provision embodied in the law of the corporate existence; or any fraudulent or dishonest act; or the occurrence of anything which shows that for any reason, whether of fault or misfortune, the bank is incompetent in any respect to perform safely and usefully any of its functions, will furnish sufficient ground for taking away its corporate franchise." *State Bank v. State*, 1 Blackf. 270.

571. The only forfeiture declared by the thirtieth section of the act of June 3d, 1864 (13 Stat. 99), is of the entire interest which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon, when the rate knowingly received, reserved, or charged by a national bank is in excess of that allowed by that section; and no loss of the entire debt is incurred by such bank, as a penalty or otherwise, by reason of the provisions of the usury law of the state. *Farmers' & Mechanics' Nat. Bank v. Dearing*, (1 Otto), U. S. S. C. 91, 29.



572. National banks organized under the act are the instruments designed to be used to aid the government in the administration of an important branch of the public service, and Congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in any wise affect their operation, except so far as it may see proper to permit. *Ibid.*

573. So, where the charter of a bank or the general law of the State prohibits it from making a loan to its directors, or loaning them beyond a given amount, and the bank violates either the charter or State law, whether directly or indirectly, as where the loan is made to an outside party, yet in fact for the use of a director, the bank is liable to forfeit its charter. It is no excuse that the directors were not aware of the law or of the fact that this director had already borrowed all he could under the law. They are imperatively bound to know it. *Bank Commissioner v. Bank of Buffalo*, 6 Paige, N. Y. 497.

574. When the relation of debtor and creditor is once established between a bank and its customer, by the opening of an account of deposit, the customer has the right to withdraw from the bank such funds at any time, and the bank is bound to honor all his checks until his balance is absorbed, and it is liable for all damages in case it should refuse to pay his checks.

575. But while the bank, like an individual, is bound to observe the laws of the land in making its contracts, it also, like an individual, can make use of and plead any legal defences it may have to an action brought against it by its customers. For instance, the statute of limitations will run in favor of the bank, like any other debt at common law. And it is an important question as to when the statute of limitation will begin in favor of the bank. In 3 *Pick.*, 96, and 16 *Mee. & W.*, 321, Mr. Morse says, p. 31: It was held that the statute began "from the date of the last balancing of accounts, as in the depositor's bank book, if no subsequent transaction should take place between the depositor and bank." But he does not think this rule to be "founded either in reason or sound law," and says the proper date for the statute to run is after a demand made by the depositor for the balance to his credit, or rather, after a refusal for any amount less than the balance, upon a proper demand being made by the depositor, and reasons thus:

576. The longer funds remain in the bank, the greater will be the gain of the bank. "The banking business finds a great portion of its profits—in many cases all its profits—in the use of the funds of other persons," its depositors. "If it has been allowed to reap extraordinary gains from the funds of one man, because it has been allowed to retain them undisturbed for the unwonted space of eight, ten or twelve years, this would seem to be no just cause for allowing it to add the still more enormous gain of a complete appropriation of the whole sum." *Morse*, p. 31.

577. "We have already seen that it is a contract specially modified by the clear legal understanding that the money shall be forthcoming to meet the order of the creditor, whenever that order shall be properly presented for payment. It follows, therefore, that this demand for payment is an integral and essential part of the undertaking—it may be said, even of the debt itself. In short, the agreement of

the bank with the depositor is only to pay on demand; accordingly, until there has been such demand, and a refusal thereto, or until some act of the bank has dispensed with such demand and refusal, the statute cannot begin to run." *Morse*, p. 32, citing authorities.

578. On the same principle, a bank cannot be sued by its depositor until a demand, for the contract was to pay on demand, and until a demand no violation of the contract takes place and no right of action accrues. *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92.

579. In addition to the general deposits of its customers—as to which the bank's duties and liabilities have been mentioned—banks usually receive money and other valuables as special deposits, and, as to this kind of deposit, the liability of the bank also attaches. Where it receives the special deposit, and agrees to take it without pay, it becomes a naked bailment, and the bank is held to no further supervision over it than over its own valuables of like kind, and is not liable, even if its own officers steal it.

580. But, if any special contract is made by which the bank is to receive compensation for keeping the deposit, or to derive any benefit therefrom, then its responsibility is increased, and it would be liable if stolen by one of its officers. *Morse*, 55 and 56.

581. If money be deposited—current money of the country—it would be a general deposit, unless specially agreed to be otherwise, and would go to the general account of the depositor.

582. On the contrary, if gold or foreign coin be deposited, and no special contract is made, the presumption would be that it was placed in the bank as a special deposit, and the bank would only be liable in case it failed to return the same in specie; the ownership would remain in the depositor, and the bank would not be liable in case of loss, unless from its own gross neglect.

583. And where—as at the present time, gold coin has ceased to be the current money of the country—a deposit is made in gold coin of the United States, where it is used as a commodity, like any other chattel, it would seem a deposit made in gold coin, in the absence of a special contract showing the contrary intention, would be a special deposit, and the bank would be bound to return it in specie, and could not discharge itself by returning or tendering a similar amount on its face of legal tender notes, but would be liable for the market value of the gold at the time of the conversion. *Same*, p. 58; also, *Sanford v. Hays*, 52 Penn. St. 26.

584. So, where a special deposit is made, whether of a bag of gold, of foreign or uncurrent bank notes, or current money in a sealed box, the depositor remains the owner, and the bank becomes the bailee, and on its insolvency the owner has a right to the specific property, and it does not go to the general creditors of the bank. *Foster v. Essex Bank*, 17 Mass. 479.

585. Of course, this is only where it remains in a separate package. Should the bank convert the gold or the contents of any other package, and it should fail, the package could not be recovered in specie, and then the depositor would have to take the position of a general creditor of the bank. In such a case, however, the directors might be individually liable for the conversion. *United Society of Shakers v. Underwood*, Court of Appeal of Kentucky, 1874.



586. And it will be observed from the above, that the responsibility of a bank as to special deposits is increased according to the circumstances under which it receives the deposit, whether it received it as a naked bailment, as a special favor to the depositor for which it receives no benefit, or whether as a bailment for which it does receive a benefit. In the former case, as has been observed, the liability of the bank only attaches when it is guilty of gross negligence, almost amounting to fraud. It is only necessary for the bank to give it that care, and to keep it like it does its own valuables, and is not liable should it be lost or stolen, even should its own officers steal it.

587. But, in the latter case, where it receives a benefit, it is held to a stricter responsibility, and is bound to keep it with great care, and is liable if loss occurs, even if it was guilty of no neglect, even should its officers steal it as well as property of the bank. *Wiley v. National Bank of Brattleboro*, Sup. Ct. Vt., Feb. 1875; *First National Bank of Lyons v. Ocean National Bank*, N. Y. Court of Appeals, March, 1875.

588. Even the directors may be held liable individually, for a special deposit of bonds, left with cashier on deposit, where the cashier disposed of the bonds and placed proceeds to the credit of the bank, and the directors declared a dividend after knowledge of the conversion, upon the insolvency of the bank. *United Society of Shakers v. Underwood*, Ky. Ct. of Appeals, 1874.

589. A serious question, however, lies back of all this; a question, too, in which the most recent decisions of some of the ablest courts are modifying the views held by their predecessors. The question is this: Is receiving special deposits within the legitimate sphere of duty of a bank? Can any officer, or even the board of directors, render the corporation liable for the loss of special deposits? The two cases above referred to, raise this question in the most serious manner; and while they both decline giving it a definite answer, since they held the bank not liable on other grounds, yet they leave the impression on the mind that they would have answered the question in the negative, had they been required to answer it at all.

590. Of course, where a bank receives a special deposit, as, for instance, bonds as collateral security for a loan, these principles have no application; there the bank would be liable to the full extent of the loss. The doubt extends only to cases where a deposit is left, for the sole convenience of the depositor, and the bank has no manner of interest in, or right over, the deposit.

591. In the case of *Wiley v. National Bank of Brattleboro*, the court, among other things to the same effect, say: "The deposit of these bonds cannot be distinguished from a deposit of jewelry or other valuable property, and was a special transaction not within the ordinary course and business of banking, or necessarily incident to it. If authorized (*i. e.*, if the cashier or president was authorized by the directors), it added greatly to the risk of loss to the shareholders without adding to their gain. It was a holding out of greater inducements to burglary and robbers from without, and might prove of greater temptation to dishonesty on the part of clerks and employees within the bank. As a business, it could not have been undertaken at the risk and responsibility of the corporation, by the executive officers, or

without the special authority of the board of directors." The court in this case reach the conclusion, that since there was no evidence in case that the particular officer who received this deposit was authorized to do so by the directors, nor any evidence that the bank had been in the habit of receiving such deposits, it could not be held liable for their loss. And the court regard it as a very serious question, back of all others, whether such an act would not be wholly beyond the power of the directors.

592. In the case of *Bank of Lyons v. Ocean Bank*, the court go even farther. They say: "This case has to be decided more upon the construction of the act of Congress, considered with reference to settled principles that stand about the subject, than upon decided cases. And upon that act, so considered, it is determined here that the keeping of such special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of such banks." And, while in this case too, the deposit was received by the cashier, and the court hold that he could not bind the bank, yet the language is so broad and so pronounced as to include in its prohibition the directors as well as executive officers of the bank.

593. A bank may make itself liable to pay a check by certifying it to be "good," provided, it is done by the proper officer—usually the cashier; in fact, the cashier is the only officer who can legally bind a bank by certifying a check good, unless the bank has permitted some other officer to do so and recognized his authority.

594. But, should the president or any other officer of a bank certify his own check drawn on his bank as good, the bank is not bound to pay it, as such a check shows on its face its illegality, and no one can be a *bona fide* holder of it. *Clafin v. Farmers' and Citizens' Bank*, 25 N. Y. 293.

595. But, if a check of the president should be certified by the cashier as good, the bank is bound to pay it; and so the bank is bound for all checks and notes made payable at the bank where the cashier certifies the same as "good." *Mead v. Merchants' Bank*, 25 N. Y. 143. After the proper officer certifies a check to be "good," and it is not presented for payment for some time, it seems the bank cannot charge the depositor with interest only from the time of actual payment. *Morse*, p. 62.

596. It is proper, now, to consider who is the proper officer to certify a check as good, so as to hold the bank liable.

597. The Supreme Court of the United States say that it is the inherent duty of the cashier, and where the bank should claim that he did not have that authority, it is incumbent on the bank to prove that fact, and also that the holder of the check knew of the restriction placed on the cashier's inherent power. *Merchants' Bank v. State Bank*, 10 Wallace, 647.

598. And, while the cashier is the officer in whom exist the inherent power to certify checks, yet it may be a matter of usage with the different banks, and they may be bound by a certificate of different officers—for instance, for the sake of convenience a bank may permit its paying teller to certify checks "good," or it may designate any other officer to do this act as a departure from the ordinary usage, and it would be bound by the certificates of such officer. Should the bank



give the power to any one officer and another should exercise it, the bank may hold this officer bound in case any damage should accrue to the bank. *Same as above; Cooke v. State Nat. Bank*, 5 N. Y. 96.

599. But, where any other officer than the cashier certifies a check, before the holder can hold the bank liable, it is incumbent on him to show a usage of the bank to permit this officer to certify checks, or that the specific act was done with the knowledge of the directors, or was subsequently ratified by them.

600. In *Pope v. Bank of Albion*, 57 N. Y. 126, decided January, 1874, the court held that a check certified by an "assistant cashier" was not binding on the bank, even in the hands of an innocent holder for value, on the ground that it was done by a "subordinate officer," and no usage was proven that the assistant cashier was in the habit of certifying checks. The facts showed that the certifying was a fraud by the officer, as the drawer had no funds. Even should the drawer have no funds, the court would have held differently, had the certificate been made by the assistant cashier or some other officer who it was shown was in the habit of certifying checks.

601. And, it is very questionable whether the above decision will be followed by courts of other States. The opinion was given by a divided court, and it is difficult to see how a stranger to the usage of a bank can be held to know what particular officer of the bank possesses the right or authority from the bank to certify checks, when, by any reasonable interpretation, the act may be said to fall within the line of his duties, or may include the act in question. It seems singular that the "assistant cashier" should be held *as a matter of law*, a "subordinate officer," one occupying a lower position than the teller, when he is at the bank in the exercise of full power to act for the bank. It seems strange that all parties should know he had no authority to certify a check "good." It would seem the better doctrine would be to hold the bank bound, and let the bank look to the "assistant cashier" for the damage it suffered.

602. The above decision is in direct conflict with, and overrules the case in 59 Barbour, 226, and it may be subjected to the above criticism, and it seems that the principle laid down in the latter case is more in harmony with the enunciations of the decisions of the leading courts of other states, which hold the bank responsible for all the acts of its officers when performed in the line of his duties, or when a stranger to the usage of a bank takes a check certified by an officer who seemingly has the power so to certify. It is certainly quite a general custom among banks for the paying teller to certify checks, and it is difficult to understand how, *as a matter of law*, the assistant cashier occupies a more "subordinate position" than the paying teller.

603. Just how long the holder of a certified check can retain it, and yet the bank remain liable thereon, has been a question much mooted, but seems now to be settled on principle, which is this: Whenever the depositor draws his check against a portion of his balance, this operates as an inchoate assignment by the drawer of the specified amount of his funds to the payee or holder of the check, and when it is presented to the bank it becomes a notification of the bank of the assignment, and as soon as the bank certifies it good, the assignment becomes complete, and a new obligation is undertaken on the

part of the bank—it promises to pay the fund designated in the check to the holder and not to the drawer, and it is the duty of the bank to retain sufficient funds of the drawer to pay it. Should it happen that the depositor withdraws all his funds, and the bank fail to retain sufficient funds to pay the certified check, nevertheless, it is liable to the holder or his indorsee. And there being a contract thus entered into on the part of the bank and the holder of the certified check, he has all the period of time until the statute of limitation expires within which to present it. No length of time within the statute would be construed as laches on the part of the holder. A promise to pay the check on demand has been entered into by the bank, and on a sufficient consideration. When the statute begins to run may also become important. If, by the certification of the check the relation of banker and depositor is created, and the holder can draw against the funds at will, the statute will run from the day the certified check should be presented by him for payment. *Morse on Banking*, p. 283, etc.; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 152.

604. As the bank derives a benefit from the money remaining in its hands, it is reasonable to assume that the check would stand as a deposit and being so, that the holder thereof would be entitled to all the rights of a depositor.

605. In a recent case decided in New York, January, 1875 (*Persom v. Com. Exchange Bank*, 5 N. Y. Supreme Court Reports), the facts were, that a check was drawn and certified good in May, 1862, and held by the drawer or his wife until February, 1869, when it was indorsed over to another party. The drawer had, in the meantime, drawn out all his funds. The court held the indorsee could not recover from the bank, on the ground he was not a purchaser for value. Had he been a purchaser for value, and received the check at or about the time it was certified, or at any other time, the bank would have been held liable, notwithstanding the lapse of time, as the statute of limitation had not expired. The bank in this case had neglected to charge the drawer with the amount of the check.

606. The usual mode to certify a check is for the proper officer of the bank to write across it "good," with the date of its presentation, and his name, with his official character; any other word written across it, showing the intention of the bank to certify it good, would be sufficient to bind the bank. By the common law in England, the acceptance could be done verbally, and, in the absence of a statute preventing it or an exclusive usage to accept it in writing, a verbal acceptance would bind the bank. In this country, the usual way, and safest, is to accept it in writing. *Merchants' Bank v. State Bank*, 10 Wall. 604.

607. A bank might make itself liable as having accepted a check by detaining it an unusual length of time after it is presented. *Morse*, 289.

608. The rule above enunciated, it must be remembered, is that, to hold a bank liable, the certification must be made by the proper officer whose duty it is to certify checks, or who is permitted by the bank to do so, or who is held out by the bank as a person authorized to certify. And, in the case just cited, as also in some other recent cases, the court intimate very strongly the opinion that a verbal certi-



fication, when clearly proven, is equally binding with a written certification.

609. There is no doubt upon the question that where a check is certified by a bank—the transaction being *bona fide*—the bank becomes liable for the amount to the holder. Another question, however, arising out of this is far more complicated, and not so well settled by adjudications; it is this: When a check is so certified by the bank, and the bank fails before paying the check, is the drawer of the check discharged at all events, or can he be still held liable on protesting the check? The circumstances attending such a transaction will, to a large extent, determine the rights of the parties; and these circumstances can be conveniently divided into three classes:

610. 1. Where the holder of the check, for his own convenience, obtains from the drawee-bank a certification of the check, preferring this mode of payment to the money.

611. 2. Where, by agreement of the parties, a certified check is taken and regarded as payment.

612. 3. Where the drawer, without explanation, or agreement of any kind, gives to the payee a certified check, and the holder receives it without agreement or comment.

613. The first class of cases was settled in *First National Bank of Jersey City v. Leach*, 52 N. Y. (Court of Appeals), 350; there a check, due December 12th, was presented at noon that day to the drawee-bank, and by it certified good; it would have been paid if the cash had been then demanded; later in the day the bank went into liquidation, and the check was, the same day, presented for payment, and duly protested. The court held the drawer was not liable. The court say: "The theory of the law is, that when a check is certified, the amount thereof is then charged to the drawer. Every well-regulated bank adopts this practice to protect itself. It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet his certified check. That money is no longer his."

614. The court then distinguish between accepting a time-draft and certifying a due-check to be good, saying that the former does not and the latter does operate as a payment; for the reason that, in the case of the time-draft, the money is not due and the holder is obliged to wait till maturity; while the certifying of a check is a declaration by the bank that the money is on hand to be paid, if the holder so elect, and that it is his own fault if he do not receive the money, and that he cannot throw the risk on the drawee. There can be no possible doubt of the soundness of these views.

615. In the second case, it is obvious that the check, like any other piece of property, will constitute a payment when the parties so agree. In fact, the reasoning of the last case is nearly equally applicable in this.

616. In the third case, the question is more difficult, and, so far as we have been able to discover, has not been directly decided. On principle, however, the answer seems to be: that where I receive a certified check, in payment of a debt or otherwise, from the drawer, and no agreement is made, it does not operate as a payment, so far as the drawer is concerned, unless it is actually paid by the bank.

617. What is the certifying of a check given under those circumstances, in principle, but the giving of an indorsed piece of paper? It is, in principle, the promise of the drawer to pay a given amount; and contains, further, the promise or guarantee of the drawee-bank that the promise is or shall be made good. And where a piece of paper is given me, on which a guarantor, not of my choosing, is insolvent, on what principle can it be claimed that the mere fact of my having taken such a piece of paper shall discharge the original promisor?

618. None of the reasoning in the former case is applicable to circumstances like the present; there is no choosing of the bank by me for my convenience. I do not ask the bank to transfer the amount of the check to my credit; there is no volition on my part in this case. Very likely, the holder might be held to a good deal of diligence in presenting the check for payment; but probably to no greater degree than in the case of an uncertified check.

619. Would it not seem, then, that a certified check is not any more than one not certified, under these circumstances, a payment until it is actually paid—and that where the same is promptly presented for payment, and protested, the drawer can be held?

620. Of course, in those States where taking negotiable notes is held *prima facie*, or even absolutely a payment, this rule, probably, would not apply.

621. An assignment of a fund to his credit, or a portion thereof, may be made by a depositor that will bind the bank, although not done in writing—as, where he assigns verbally to a certain party so much money, and the party notifies the bank of the assignment and the bank agrees to pay the same. In *Foss v. Lowell Savings' Bank*, 111 Mass.; decided 1873.

622. In this case, a depositor in a savings' bank delivered to a party his deposit-book, with directions for the bank to pay the balance of the deposit to the party, and he then gave notice of the assignment to the bank. Subsequently, the depositor died, and before the money was drawn by the assignee; and the court held that the bank became liable to the assignee, and if it should pay the administrator of the depositor the amount, still it would be liable to the assignee.

623. But, if the notice of the assignment had not been given to the bank until after the death of the depositor, then the administrator could alone recover. It seems, the notice to the bank while the depositor is alive, is necessary to hold the bank liable to the assignee. *Beak v. Beak*, 13 English Law Reports, 480; decided 1872.

624. The same principle, as above stated, prevails where the drawer of a check dies or becomes a bankrupt before the check is presented, and the bank has notice of the death or bankruptcy, it is bound not to pay the check, as the death or bankruptcy annuls the check.

625. Where a note, made payable at a bank, is certified as "good," if done by the proper officer—and it seems the teller can do this—whether the certificate is written on the note or on separate paper, or is verbal, it will be binding on the bank whose officer so certifies, if, on the strength of such a certificate, the bank holding the paper for collection, and who presented it, failed to notify the indorsers. *Irving Bank v. Wetherald*, 36 N. Y. 335.



626. But, where the bank who certifies the note as "good," discovers that it did so erroneously—as, where the drawer had no funds—and it notified the holder of the mistake, in time to have the note protested and notify the indorser, then the certifying bank is not liable. *Same authority.*

627. So, a verbal certification of a note, by the proper officer, that it is "good," will have the same binding force on the bank as though he had written "good" across it. *Espy v. Bank of Cincinnati*, 18 Wallace, 617; *Robson v. Bennett*, 2 Taunton, 388.

628. And, should the proper officer of the bank, the cashier or the party permitted by the bank to bind it in similar ways, promise verbally to honor a check of a certain party, and which promise is communicated by the drawer and the proper bank officer to a third person, who receives the check upon the faith of the promise so made, the bank will be bound to pay it; but otherwise, if the holder of the check did not take it on the faith of such promise. *Nelson v. First Nat. Bank*, 47 Ills. 36; *Bank v. Pettit*, 41 Ills. 492.

629. It seems from the above that the bank would be bound on a promise to honor a check, upon the faith of which a party was induced to receive it from a drawer who had no funds to his credit.

630. Where an officer of the bank, in the usual discharge of his duties, is guilty of fraudulent misrepresentation, or any other act, which, if done by an individual, would be void for fraud, the contract becomes void as against the bank; but the act must be that of the officer within the sphere of duties allotted to him. *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532.

631. And, whatever is said or done by an officer of a bank in the discharge of his proper duties, will bind the bank; and whatever information is given him pertaining to his department, will constitute knowledge on the part of the bank, and it will be liable to all the consequences of this knowledge.

632. But for acts done by the officer beyond the scope of his duties and not in his official capacity, and knowledge obtained by him in his individual capacity, and while he was not in discharge of duties pertaining to the subject about which the information was obtained, is no notice to the bank, and it is not liable to the consequences of the knowledge or for the act done. *Matthews v. Mass. Nat. Bank*, U. S. Circuit Court for Mass. 1875; *Hooker v. Eagle Bank*, 30 N. Y. 83.

633. Upon the same principle, if a bank appoints an officer, or permits him to perform the usual duties and functions of a certain office, it, by this act puts him forward as its agent authorized to do any act to bind the bank which falls within the sphere of its duties, and the public will have a right to presume he has been clothed with all the necessary powers usual to the proper discharge of those duties; and if the bank has, as a matter of fact limited the powers of such an officer from any ordinary usage, the burden of proof will devolve on the bank to show that the party who is seeking to hold the bank liable on a contract made by such an officer in the line of duty, or the usual duties of such an office, knew that his powers were limited, and the act done by him, or the contract made, exceeded his limited powers. *Matthews v. Mass. Nat. Bank*, U. S. Circuit Court for Mass. 1875.

634. But, in the absence of such actual knowledge, the presump-

tion is regularity in the acts of the officer making the contract or doing the act binding the bank.

635. It may also appear that an officer has willfully done an act which is seemingly within the line of his duty, but which he had no authority to do—as, the “cashier may willfully make a transfer or indorsement in direct disobedience of special directorial instructions;” “the outside party, dealing with him in good faith without notice of the irregularity,” may hold the bank liable for his acts.

636. It is the inherent duty of the cashier to indorse paper, and a party has a right to suppose when he does it he has the full right to do it, and the bank will be liable on such indorsements. *Morse*, p. 152; *City Bank v. Perkins*, 29 N. Y. 554.

637. So, if a party makes a contract with him as cashier, or if the cashier rejects a contract proposed to him as cashier, it will be deemed the act of the bank and not of the cashier. *New Hope and Delaware Bridge Co. v. Phoenix Bank*, 3 N. Y. 166.

638. The counterpart of this proposition is also true. The bank will be protected in paying a check of a cashier of another bank which has a fund to its credit in the paying bank, no matter if the fund went to the depositor bank or not, as the cashier is presumably the proper officer to draw against the funds of his bank. And it is proper for him to designate himself as cashier of ——— bank, to show he draws the check officially. “But should he fail to make this fact clear by these or any other words in the instrument, yet, if the drawee-bank pays the check from corporate funds, it will be protected in the payment, and it will be a valid payment, if, as a matter of fact, the cashier was acting officially, and did intend to draw against the balance standing to the credit of his bank” or corporation. *Morse*, p. 150.

639. And, the paying bank will be allowed to prove the cashier has no individual credit, but that the funds actually went to his corporation. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

640. As the cashier is the proper party to carry on and open all the correspondence of the bank, all communications made to him in his official capacity will be binding on the bank and affect it with notice. And it becomes the duty of the cashier to “communicate the contents of all letters to the proper official within whose province the subject matter falls,” and “to see that the information contained in the letter is promptly laid before the proper person.” *Morse*, p. 165.

641. Usually, the cashier cannot make a contract that will bind the bank; as before said, it is within the province of the duties of the president or directors to make contracts.

642. Yet, where all the negotiations are carried on by letter, and the cashier makes a proposition which is accepted, or accepts one that is made in this way, it binds the bank. *New Hope and Delaware Bridge Co. v. Phoenix Bank*, 3 N. Y. 166.

643. And all verbal statements made by the cashier while in the discharge of his duties, and concerning the business of the bank, will bind the bank, if acted upon.

644. As where a party, even a stranger, inquires of the proper officer of the bank, whether a certain note made payable there had been paid, or whether a check drawn on it bears signature of a depositor or



customer of the bank, or whether the depositor has to his credit the amount specified in the check, and the officer is at the same time informed that the party will rely on his statements, and should act accordingly, as, for instance, to part with property on the strength of what the officer may say, the bank will be held bound for these declarations, and liable for damage the party making the inquiry may suffer. *Espy v. Bank of Cincinnati*, 18 Wallace, 604; *Moore v. Bank of Commerce*, 52 Mo. 377.

645. But, where the officer is not notified or informed that the party making the inquiries is about to act on the information sought, or where his attention is not directed sharply to the importance of the transaction, it will only be regarded as an act of courtesy on the part of the officer and not the act of the bank, and consequently the bank will not be bound. *Franklin Bank v. Stewart*, 37 Maine, 519.

646. The cashier is generally the chief executive officer of the bank, and most of the transactions of the bank are done through him, and "the bank is bound by all the legal implications or inferences which must, as a matter of law, grow out of those acts of the cashier which he does in the prosecution of any of the functions included in his agency." He has the power, and can bind the bank, "to collect and give receipts for sums collected." *Morse*, p. 181.

647. Ordinarily, he has no authority to discharge the debtor without actual payment, or to bind the bank by an agreement that a surety shall not be looked to for payment, in case the principal does not pay; but upon inquiry by the surety, if he should inform the surety that the note is paid, intending that the surety should rely on the statement, and the surety, acting on this information, should give up securities or should indorse other paper, the bank is estopped from saying the paper was not actually paid. *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116.

648. A bank is not liable for the misrepresentations fraudulently made by a cashier, who knew the representation to be false at the time he made them, where the giving the information is not strictly within the sphere of his duties.

649. A case was decided in England, *Swift v. Junesbury*, Exch. Chamber, in 1874, which is referred to in *Central Law Journal* of April 2, 1874, on this point: A customer of a bank applied to his bank for information concerning the standing of a party living at a distance. The manager of this bank wrote to the manager of the bank where the party resided, asking for the standing of the party, stating the reasons for the inquiry. The manager of the latter bank wrote that the party was perfectly responsible. The court held the bank not liable; but that the manager was personally liable for the entire loss resulting from the misrepresentation.

650. A bank is not liable for negligence or want of skill on the part of its officer, who does an act which has never been settled by the courts, and, concerning which, there is no established usage among banks; as for protesting a "post note," without giving days of grace. *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13.

651. Should an officer of the bank take a check in payment of a note left with it for collection, and the check should not be paid, it is liable to the owner of the note, even though the bank should show a

custom among banks and business men to take checks from good parties in payment of debts. *Whitney v. Esson*, 99 Mass. 310.

652. Where a depositor of a bank instructs his bank to pay checks out of his deposit account drawn by an agent, for a definite period only, and the bank is informed accurately of the time, it must only pay checks drawn within that time, or it will be liable to the depositor, even though the depositor's pass-book has been balanced several times. *Manufacturers' Bank of Chicago v. Barnes*, Sup. Court of Ill. 1873.

653. In this case, it was shown depositor did not examine his pass-book till several months afterwards.

654. Where a bank holds a note made by one of its depositors, and at maturity has sufficient funds of the depositor to pay it, and neglects to so appropriate the fund, and the depositor afterwards withdraws his fund, not leaving sufficient to pay the note, the neglect of the bank will discharge the surety; *provided*, the surety notified the bank that he requires it to enforce its lien on the property of the depositor in its possession and subject to the lien. *Dawson v. Real Estate Bank*, 5 Ark. 283.

655. In this case, it was even held that without such demand and notice from the surety, the bank would be bound to enforce its lien on the property of the depositor and maker of the note, or the surety would be discharged. But this is opposed to the leading cases on this point, and the true rule is that above. *Marsh v. Oneida Bank*, 34 Barb. N. Y. 298.

656. Where a customer of a bank instructs it to pay certain drafts drawn by A, whenever A produces to the bank "clean bills of lading" for certain merchandise, and A presents bills of lading, apparently genuine, but which turn out to be forged—the bank is *not* liable to its customer to repay to him sums so advanced. *Ulster Bank v. Synott*, 5 Irish Rept. 595; decided in 1871.

657. The principle involved in this case is, that the bank is not presumed nor bound to know the signature of the official whose duty it is to sign the bill of lading, and that where the customer by his act leads the bank into the belief that a certain party is owner of and will produce a genuine bill of lading, it is justified, in the absence of suspicious circumstances, in assuming the bill of lading to be correct. The customer should have been careful enough to furnish the bank with the genuine signature of the officer whose duty it was to sign the bill of lading.

658. Where a bank employs both a receiving and a paying teller, and a customer comes to pay a debt due to the bank, and, in the absence of the receiving teller, whose customary duty it is to receive the money, he pays it to the paying teller and the latter does not give him credit therefor, yet the bank will be liable for the amount so paid, unless the customer knew, as a matter of fact, that the paying teller had no authority to receive the money. *East River National Bank v. Gore*, 57 N. Y. 597; decided September, 1874.

659. Where the bank, through mistake, gives its customer credit for the amount of a note left with it for collection simply, it must, on discovering the mistake, promptly notify the customer, and do no act which looks like exercising ownership over the note, as suing on the note in its own name, or it will be held to have waived the error and



made the note its own. *Whetherill v. Bank of Pennsylvania*, 1 Miles, 399.

660. It has been held that a bank may assume a liability, which is nearly akin to the principle of certifying a check—as where it credits to the payee the amount of the check, where both the drawer and the payee are its customers, when, as a matter of fact, the drawer had not sufficient funds to pay the check, and though the credit was given by mistake in the hurry incident to business. This seems to be the rule, even where the depositor to whom the amount of the check was credited had not drawn against the fund so placed to his credit. *Bolton v. Richard*, 6 Term Reps. 139.

661. Of course the bank will not be liable for the mistake, and can correct it, if the depositor knew the drawer had no funds or was guilty of any other fraud, on the same principal that the bank could recover a payment made in the same way. *Morse*, p. 320.

#### RIGHTS, DUTIES AND LIABILITIES OF NATIONAL BANKS.

662. 1. Rights or powers of national banks are: to exercise all such incidental powers as are necessary to carry on the business of banking, by discounting and negotiating notes, drafts and bills; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of the act of Congress.

663. The directors have power to regulate, by by-laws not inconsistent with the provisions of said act, the manner in which its directors and other officers shall be elected or appointed, the manner in which its stock and other property shall be transferred, and its general business conducted. *Act of Congress*, 1864, § 8.

664. Under this section it has been held that a national bank has no power to act as a broker, and sell railway and other bonds on commission; and that an action cannot be maintained against such a bank for damages sustained through the misrepresentation of its teller as to the character of the bonds of a railway company which it sells to a customer; that the power to engage in such a transaction not having been conferred upon the bank by the statutes creating and regulating it, the bank may set up the defence of *ultra vires* in such an action. *Meckler v. First Nat. Bank of Hagerstown*, Court of Appeals of Maryland, April term, 1875; reported in 2d *Central Law Journal*, 471.

665. It is entitled to receive from the comptroller of the currency circulating notes of different denominations, equal in value to ninety per cent. of the current market value of the United States bond, deposited with the Treasurer of the United States; but not exceeding ninety per centum of the amount of said bonds, at the par value thereof; and at no time can the amount of the notes issued to a bank exceed the amount of the capital stock at that time actually paid in. *Ibid*, § 21.

666. It has the right to purchase, hold and convey such real estate, and such only, as shall be necessary for its immediate accommodation in the transaction of its business; such as shall be mortgaged

or sold to it in good faith to secure, or in payment of, debts previously contracted; and such as it may purchase at sheriff's sale in the collection of debts due to it. And in no other manner and for no other purpose can it purchase or hold real estate; and it can hold real estate, purchased in payment of debts due to it, for five years, and no longer. *Ibid*, § 28.

667. It has been decided that a mortgage on real estate made to a national bank to secure present or future loans are void, as being against the provisions of the act of Congress; it can only take real estate security, to prevent losing loans previously made, in good faith. *Fowler v. Scully*, 72 Penn. St. 456.

668. National banks cannot be held responsible for special deposits (as box of valuables), left with their cashier or president, without showing that the directors assented to it, or that the bank was in the habit of receiving those deposits. It is even a question whether those banks have a right to receive special deposits. This latter point is not definitely settled, but strongly doubted; but the first point—viz: that, without proving usage on the part of the particular bank in receiving special deposits or sanction on the part of the directors of that particular act, the bank cannot be held liable—is settled clearly and definitely by the two following cases: *First Nat. Bank of Lyons v. Ocean Nat. Bank*, N. Y. Court of Appeals, March, 1875; *Wiley v. Nat. Bank of Brattleboro*, Supreme Court of Vermont, February, 1875.

669. National banks cannot be proceeded against in bankruptcy; if insolvent, the remedy is to proceed in the mode pointed out by the National Banking Act and its amendments. *In re, Manuf. Nat. Bank*, District Court of U. S., Northern District Illinois, December, 1873.

670. The term "capital," employed by banks in the business of banking, in the 110th section of the revenue act of July 13th, 1866, and on which the banks are liable to pay taxes, does not include moneys borrowed by them temporarily in the ordinary course of the business of the bank. It applies only to the property or moneys of the bank, actually subscribed or set apart from other uses and permanently invested in the business. *Bailey, Collector v. Clark*, Supreme Court of U. S. October term, 1874.

671. While this decision applies, in terms, only to the rights of a private banker, the principle is, unquestionably, equally applicable to incorporated banks.

#### DUTIES OF NATIONAL BANKS.

672. No association can be organized under this act with a less capital than one hundred thousand dollars, nor in cities whose population exceeds fifty thousand persons with a less capital than two hundred thousand dollars; but, with the approval of the secretary of the treasury, a bank in a place whose population does not exceed six thousand people may be organized with a capital of fifty thousand dollars. *Act of 1864*, § 7.

673. A bank may increase its original capital under the direction of the comptroller of the currency; but no increase is valid until the whole amount of such increase is actually paid in and notice of such



fact transmitted to the comptroller, and his certificate, approving such increase, transmitted to the bank. *Ibid*, § 13.

674. The bank is not authorized to commence business till fifty per cent. of its capital is actually paid in, and the remainder of the capital must be paid in installments of ten per cent. at least as often as once a month. *Ibid*, § 14.

675. Each bank, before beginning business, must deposit with the Treasurer of the United States registered bonds of the United States, not less than thirty thousand dollars, nor less than one-third of the capital stock paid in; and it must keep, at all times on deposit, with said Treasurer, such bonds amounting to at least one-third of its capital stock actually paid in. *Ibid*, § 16.

676. It is the duty of each bank to have on hand, at all times, in lawful money of the United States, an amount equal to at least fifteen per cent. of its notes in circulation and its deposits; and banks located in certain cities, designated in section 31, must have on hand at least twenty-five per cent. of such money; and whenever this reserve falls below the above proportion, the bank is prohibited from declaring any dividends of its profits or making loans or discounts, except the discounting of or buying bills of exchange payable at sight, until the above proportion between its reserve and notes and deposits is once more restored. *Ibid*, § 31.

677. Dividends of the net profits may be declared semiannually, but it is the duty of the directors, before declaring any dividend, to carry one-tenth part of the net profits of the preceding half-year to its surplus fund, until this fund shall amount to twenty per cent. of its capital stock. *Ibid*, § 33.

678. It is the duty of the bank to make to the comptroller of the currency not less than five reports annually, according to the form prescribed by the comptroller, verified by the oath of the president or cashier, and attested by the signature of at least three of the directors; and such report must also be published in some newspaper of the county where the bank is located. The comptroller may also, in his discretion, call for special reports at any time. And the bank is liable to a penalty of \$100 for every day it is in default, after the first five days when the report is due.

679. In addition to the above reports, the bank must report to the comptroller, within ten days after a dividend is declared, the amount of such dividend, the amount of net earnings in excess of the dividend, the report to be attested by the oath of the president or cashier. *Act of March 3, 1869*.

680. The bank must never be indebted to an amount exceeding the amount of its capital stock actually paid in and remaining undiminished by losses, except on the following accounts: 1. On account of its circulation; 2. On account of moneys deposited with or collected by it; 3. On account of bills of exchange or drafts drawn against money actually on deposit to its credit, or due thereto; 4. On account of liabilities to its stockholders for dividends and reserved profits. *Act of 1864, § 36*.

681. The bank is not permitted to pledge, directly or indirectly, any of its notes of circulation, for the purpose of procuring money to be paid in on its capital stock or to be used in its banking operations; nor

is it permitted to use its circulating notes, in any manner or form, to create or increase its capital stock. *Ibid*, § 37.

682. Neither the bank nor any member thereof is permitted to withdraw, nor permitted to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. And if any losses are sustained by the bank, which are equal to or exceed its undivided profits then on hand, then no dividend can be made. No dividend can be declared to an amount greater than its net profits on hand, after deducting from such profits the losses and bad debts. All debts due the bank, on which interest is past due and unpaid for the period of six months, unless the debts are well secured, and in process of collection, are to be counted as bad debts in making this computation. *Ibid*, § 38.

683. The bank is not permitted to pay out on loans or discounts, or in purchasing bills of exchange, or in payment of deposits, or in any other mode to pay or put in circulation, the notes of any bank or banking association, which notes are not at such time receivable, at par, on deposit, and in payment of debts by the association which has paid out or put in circulation the said notes; nor is it permitted to put in circulation the notes of any bank which does not redeem its paper in lawful money of the United States. *Ibid*, § 39.

684. It is the duty of the bank to keep at all times a full and correct list of the names and residences of all its shareholders, with the number of shares owned by each. This list is to be open during business hours to the inspection of its shareholders and creditors, and the proper taxing officers of the state. A copy of this list is to be transmitted to the comptroller, verified by the oath of the president or cashier, on the first Monday of each July. *Ibid*, § 40.

685. Where a law of the State where the bank is located provides, that the cashier shall transmit, to the clerks of the several towns in which any of the stockholders of that bank reside, a true list of such stockholders, and a penalty is imposed on the cashier for the neglect of such duty, the fact that the bank keeps such a list of its stockholders as is required by act of Congress, and that the list is accessible to the assessors of the town on application to the bank, will not absolve the cashier from complying with the requirement of the State law on this subject, nor mitigate the penalty. *Newman v. Wait*, 46 Vermont, February Term, 1874.

686. Shares in national banks are taxable at the place of its location by the State in which the bank has its *habitat*, and that is so, whether the stockholders are residents or not of that place. *Tappan v. Merchants' Nat. Bank of Chicago*, Supr. Court of U. S., April, 1874. Shares of stock in national banks may be taxed by States or municipal corporations in the place where the bank is situated, and may be assessed at a higher rate than their par value. They may be assessed at their market value. *Hepburn v. School Directors of Borough of Carlisle, Penn.*; decided by the Sup. Court of U. S. in 1875.

#### LIABILITIES OF NATIONAL BANKS.

687. The capital stock of the bank is to be divided into shares of one hundred dollars each, which are to be considered personal property



and transferable on the books of the bank, in the manner provided by its article of incorporation; and every person becoming owner of such shares by transfer succeeds to all the rights and liabilities of the vendor; and no change can be made in the articles of association by which the rights, remedies or security of existing creditors of the bank shall be impaired. The shareholders are held individually liable, equally and rateably, and not one for another, for all contracts and engagements of the bank, to the extent of the amount of their stock therein, at its par value, in addition to the amount invested in such shares. *Act of 1864, § 12.*

688. The total liabilities to any bank, of any person, or of any company, corporation or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, must at no time exceed one-tenth part of the amount of the capital stock of the bank actually paid in. The discount of *bona fide* bills of exchange drawn against actually existing values, and the discount of commercial paper actually owned by the person or persons, corporation or firm negotiating the same, is not considered as money borrowed. *Ibid, § 29.*

689. It has been decided by the Supreme Court of Pennsylvania, in *O'Hare v. National Bank*, 32 Leg. Intel. 29, that the act of 1864 (§ 29) does not prevent recovery on securities taken by a national bank for a loan in excess of one-tenth of its capital, the transaction not being collusive between the bank and the borrower. The court say: "Evidently the limitation of the indebtedness to the one-tenth was intended as a general rule for conducting the business of the bank—a rule laid down from experience to regulate its loans for its own best interests and those of stockholders and creditors—not a rule to regulate its customers. It was a regulation to prevent these associations from splitting on the rock which has ruined so many banks, to wit: that of lending too much of their capital to one person or firm—the intention being to protect the association and its stockholders and creditors from unwise banking. We cannot suppose it was meant to injure them by forbidding recovery of injudicious loans." This is a sound construction of the law in question. *Albany Law Jour.*, January 30, 1875.

690. The bank may charge, on loans and discounts, interest at the rate allowed by the laws of the State where it is located; but where, by the laws of such State, a different rate is fixed for banks of issue organized under the State laws, the rate so fixed is the rate which the national bank may receive. And when no rate is fixed by the State laws, then the bank may receive seven per cent., and such interest may be taken in advance. The knowingly taking a greater rate of interest than the above creates a forfeiture of the entire interest on the debt; and in case usurious interest has been actually paid to the bank, the person or his representatives may recover back, in an action of debt, twice the amount of the interest thus paid; *provided*, that the action is commenced in two years from the date of the payment. Adding the current rate of exchange on bills payable elsewhere than where they are negotiated to the above rate of interest is not to be deemed usury. *Act of 1864, § 30.*

691. The provisions of the Banking Act of 1864, imposing penalties

upon national banks for taking usury, supersede the State laws upon that subject. *Davis v. Randall*, 115 Mass. 547; decided in 1874.

692. Usury laws of states are not applicable to national banks; the United States have the right to fix interest laws applicable to those banks, and the penalties for violations; and those laws are exclusive of State laws on the same subject, as applicable to those banks. *Central Nat. Bank v. Pratt*, 2 *Am. Law Times*, (N. S.) 1.

693. Where the penalty imposed by Congress on national banks for taking usurious interest is sought to be enforced in a State other than where the bank is situated (the bank in this case was situated in Iowa and the suit was brought in Illinois) the court has no jurisdiction, as the court will not enforce a penalty imposed by another sovereign State on its subjects. *Miss. Riv. Telegraph Co. v. First Nat. Bank*, Supreme Court of Ills., January, 1875.

694. Where, as in New York, the State statute prohibits a corporation from pleading usury, and a usurious loan is made by a national bank to a corporation, the effect of such statute is as if the State laws had fixed no law relating to interest, and the transaction is governed simply by the provision of act of Congress, and the bank incurs the penalties of that act and not those of State laws. *Receiver of Ocean Nat. Bank v. Estate of Wild*, United States Circuit Court, S. D. of N. Y., 10 Bankr. Reg. 568.

695. Under the foregoing section it has been held that where a bank stipulates for usurious interest, it may recover the principal and that only, forfeiting all interest; and where the usurious interest has been paid, the penalty, the recovery back of double the amount of the excess over legal interest and that it is the actual payment of the usurious interest which consummates the usury, and from which the limitation of the suit for the penalty begins to run; and held further, that in a suit by the bank against an indorser of a note, which note is the result of several renewals, on each of which usurious interest has been paid, the indorser can set off in this suit all the excess of interest received by the bank on the several renewals. *Brown v. Second Nat. Bank of Erie*, 72 Penn. St. 209; decided 1872.

696. Whenever a bank is notified by the comptroller that its reserve is below the amount required by law, and the bank fails for thirty days thereafter to make good its reserve, the comptroller may, with the concurrence of the secretary of the treasury, appoint a receiver and wind up its business. *Act of 1864*, § 31.

697. If any bank fail to redeem its notes at the places of deposit designated by the comptroller, he may appoint a receiver and proceed to wind up its business. *Ibid*, § 32.

698. The bank is not permitted to make any loan or discount on the security of the shares of its own capital stock; nor is it permitted to be the purchaser or holder of its stock, unless the purchase shall become necessary to prevent loss of a debt previously contracted in good faith; and stock so purchased must be sold within six months from the day of purchase. *Ibid*, § 35.

699. Under this section it has been held that a party owning a stock certificate in a national bank may transfer the same by delivery and indorsement, and the purchaser gets a good title, even though the former owner was indebted to the bank, and the bank made him the



loan on the strength of it—for national banks cannot legally make loans on their stock; and it is the duty of the bank to make the transfer on its books, whenever the owner of the shares has disposed of the same. The only exception being, when it is necessary to take pledge of the stock, to prevent loss of loan made *bona fide* and at a previous time. *Bank v Lanier*, 11 Wall. 369.

700. National banks have no lien on stock of stockholders for unpaid balance due from them on general account; of course, this does not refer to unpaid subscription on the stock; nor can the bank improve its position by enacting in its articles of incorporation that stockholders shall not be permitted to transfer their stock while indebted to the bank; such a provision is in conflict with the law under which the bank is incorporated, and is therefore null and void. *Bulard v. Bank*, 18 Wall. 590.

701. It would seem, however, that the rule is otherwise as to cash dividends due the stockholder on his shares. The following is the syllabus made by the *Albany Law Journal* of July 24, 1875, of the case of *Hagar v. Union Nat. Bank*, 63 Maine, 509.

702. "A bank had sued an overdue note of a stockholder and attached his shares. During the pendency of this action, the stockholder demanded payment of the dividends declared upon the attached shares, which was refused. He subsequently settled that suit, and then, without renewing his demand, brought the present action for his dividends. Held: That it could not be maintained; that a bank has the right to hold a cash dividend as pledged for the indebtedment of the shareholder of the bank."

703. The transfer of any notes, bills and other evidences of debt, or of deposits to its credit; the assignments of mortgages, sureties on real estate or judgments; all deposits of money, bullion or other valuable thing, for its use or for the use of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by law, or with a view to give preference of one creditor to another, except in the payment by the bank of its notes is utterly null and void. *Act of 1864*, § 52.

704. If the directors of any bank knowingly violate, or knowingly permit any of its officers, agents or servants to violate any of the provisions of the act of Congress, relating to national banks, the bank forfeits all the rights, privileges and franchises derived from said act. Such violations however, is to be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought by the comptroller for that purpose. And in cases of such violation, every director who participated in or assented to the same, is held liable in his personal and individual capacity for all damages sustained in consequence of such violation by the bank, its shareholders or any other person. *Ibid*, § 53.

705. Although, under this section, the bank, as such, cannot be proceeded against in a State court, it would seem that the directors might be sued in such court by any party entitled to bring the action. This doctrine would seem to follow, from the principle laid down in *Commonwealth v. Barry*, cited in the next section.

**706.** Every president, cashier, director or other agent of the bank who shall embezzle or willfully misapply any of its moneys or other assets, or who shall, without authority from the directors, put in circulation any of its notes; or who, without such authority, shall issue any certificate of deposit, draw any bill of exchange, or assign any of the assets of the bank; or who shall make any false entry in any book, report or statement with intent to defraud, injure or mislead any person or corporation, shall be guilty of a misdemeanor, and be liable to imprisonment not less than five nor more than ten years. *Ibid*, § 55.

**707.** State courts have jurisdiction over larcenies committed by officers of national banks by embezzling the funds of the bank, and this is so, though the act of Congress of 1864 makes the embezzling of those funds a misdemeanor under the laws of the United States. *Commonwealth v. Barry*, 116 Mass. 1; decided in Sept. 1874.

**708.** Suits against national banks may be brought in the United States or State courts of the State or district where the same is located, but suits to enjoin the comptroller from enforcing the provisions of the acts of Congress must be brought in the United States courts. *Act of 1864*, § 57.

**709.** National banks cannot be sued by attachment in court of States other than where they are located. The act of Congress deprives the State court of jurisdiction over the bank, and the United States court will enjoin a judgment rendered against a national bank under those circumstances. *Cadle, Receiver, etc. v. Tracy*, 11 Blatchf., Cir. Court Rep. 101; decided April, 1873.

**710.** A bank is not permitted to offer or receive United States or national bank notes as security for any loan of money, nor, for a consideration, can it agree to withhold said notes from use, nor can it offer or receive the custody, or promise of custody, of such notes as security or as a consideration for a loan of money. A violation of these provisions is a misdemeanor, subjecting the bank to a penalty of \$1,000, and to a further sum equal to one-third of the money so loaned, and the officers making such loans are liable to a further fine in a sum equal to one-fourth of the sum of money so loaned. *Act of Feb. 19, 1869*.

**711.** A national bank is liable to be sued in any court having jurisdiction; it is not competent for Congress to restrict the jurisdiction to any particular courts. *Cooke v. State Bank of Boston*, 52 N. Y. 96; S. C., 50 Barb. 339.

**712.** A religious society purchased and held in its own name certain shares of a national bank, using for the purpose a fund which had previously been given to such society by a testator, the whole bequest being used in the purchase. The society had other funds, given by other donors, which were otherwise invested. *Held*, that the society was not to be regarded as a trustee, but as an ordinary stockholder, and was liable as such to assessment for the debts of the bank on its failure. *Davis v. Essex Baptist Society*, 44 Conn. 582.

**713.** Under and by the provisions of National Banking Act (§§ 8, 28), a national bank is prohibited from taking a mortgage upon real estate, except for debts contracted prior to the giving of the mortgage; and a mortgage given to secure future indebtedness is void. *Crocker v. Whitney*, 71 N. Y. 161.



714. A special deposit of bonds was left by a customer with the cashier of a national bank for safe keeping, with the knowledge of its directors, and the cashier gave a receipt therefor. The bonds were subsequently stolen and the bank offered no satisfactory explanation of the manner of the theft. *Held*, that there was sufficient evidence of gross negligence to be submitted to the jury. *Held, further*, that a recovery could be had against the bank if the bonds were stolen through the gross negligence of its officers. *Bank v. Graham*, 85 Penn. 91.

715. It seems that a bank, in the absence of any restriction imposed by its charter, may take a mortgage to secure anticipated liabilities, as well as those existing at the time; but the Legislature, whose creation it is, may impose such a restriction in its charter. *Crocker v. Whitney*, 71 N. Y. 161.

716. By habitually receiving special deposits to be kept for mere accommodation, national banks incur liability for gross negligence. *Chat. Nat. Bank v. Schley, guardian*, 58 Ga. 369.

717. National banks, as Federal agencies, are only exempted from State legislation so far as it may impair their efficiency in performing the functions by which they are designed to serve the government of the United States. It is only where a State law incapacitates them from discharging these duties that it becomes unconstitutional. *Thomas, et al. v. Farmer's Bank of Md.*, 46 Md. 43.

718. To protect a trustee, who is a stockholder in a national bank, from personal liability, under the provisions for such exemption in the act of Congress with regard to national banks, it must appear on the books of the bank that he was such trustee. *Davis v. Essex Baptist Society*, 44 Conn. 582.

719. The omission of the officer of a national bank to exact security for moneys lent cannot be made a ground of defence to an action brought by the bank to recover such loan. *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colorado, 248.

720. In ordering an assessment for the payment of the debts of an insolvent national bank, the stock certificates and stock ledger of the bank must be taken by the comptroller of the currency, in the absence of fraud or mistake, as showing who the stockholders were at the time of the failure of the bank. *Davis v. Essex Baptist Society*, 44 Conn. 582.

721. State courts have jurisdiction of suits brought by national banks, it not having been taken away by section 57, No. 85, of Sts. U. S. 1863-64. *First Nat. Bank of Montpelier v. Hubbard, et al.*, 49 Rowell, Vt. 1.

722. National banks are not responsible for the safe keeping of special deposits made according to usage, for the accommodation of depositors, and with the knowledge and acquiescence of the bank directors, but without profit to the bank—the receiving of such deposits not being authorized by the National Banking Act, under which such banks are organized. *Whitney v. First Nat. Bank of Attleboro'*, 50 Vt. 388.

723. The stockholder, in subscribing for or in accepting the stock, assents to becoming security to the creditors for the payment of the debts of the bank. *Davis v. Essex Baptist Society*, 44 Conn. 582.

724. A statute of Vermont is not void, which, for the purpose of

taxation, requires, under a penalty for his neglect or refusal, the cashier of each national bank within the State to transmit, on or before the fifteenth day of April in each year, to the clerks of the several towns in the State in which any stock or shareholders of such bank shall reside, a true list of the names of such stock or shareholders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month. *Waite v. Dowley*, 94 U. S. 527.

725. The shares of stock of a national bank in New York should be assessed for taxation at their actual value. The ruling in *Van Allen v. The Assessors*, 3 Wall. 573, as to the invalidity of the act of the Legislature of New York of March 9, 1865, known as the Enabling Act, so far as it provided for the taxation of shares in a national bank, reaffirmed. *People v. Commissioners of Taxes and Assessments*, 94 U. S. 415.

726. DEPOSITORS' CLAIMS.—The claims of depositors in a national bank at the time of its suspension for the amount of their deposits are, when proved to the satisfaction of the comptroller of the currency, placed upon the same footing as if they were reduced to judgments. *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 U. S. 437.

727. When a national banking association is insolvent, the order of the comptroller of the currency, declaring to what extent the individual liability of the stockholders shall be enforced, is conclusive. *Kennedy v. Gibson, et al.*, 8 Wall. 498; cited and approved. *Casey v. Calli*, 94 U. S. 673.

728. When his order is to collect an amount equal to the full par value of the stock, the suit by the receiver against the stockholders must be at law, and that amount will bear interest from the date of the order. In such a suit the stockholder is estopped from denying the existence or the validity of the corporation. *Ibid.*

729. When authority of cashier of bank to compromise a claim will be presumed. See *C. N. Bank v. Kohner*, 85 N. Y. 189.

730. No authority other than that conferred by Congress is required to enable a bank existing under a special or a general State law to become a national banking association. The certificate of the comptroller is conclusive as to the completeness of the organization under the act of Congress in a suit against a stockholder to enforce his liability, or a party upon his contract with the bank. *Ibid.*

731. A plea is bad which sets up that the comptroller has decided to pay a large amount of claims for which the bank is not responsible, and that, aside from those claims, there are means enough to meet the just liabilities of the bank. *Ibid.*

732. By an act of Congress with regard to national banks, all stockholders of such banks are liable to assessment for the debts of the banks in case of their insolvency, to the extent of the par value of their stock in addition to the amount invested in such stock; but persons holding stock as executors, administrators and trustees are not to be personally subject to any liability as stockholders, but such liability is to attach only to the property in their hands. W. died in January, 1871, being at the time a stockholder of a national bank. His estate was subsequently settled, with a limitation for the presentation of



claims, a settlement of the administration account, and a final distribution. The bank failed December, 1871, and a receiver was appointed by the comptroller of the currency, and in January, 1877, a long time after the distribution of W.'s estate, the comptroller made an assessment upon those who were stockholders at the time of the failure of the bank. *Held*, in a suit brought by the receiver against W.'s administrator—

733. 1. That the stock was not to be regarded as having been, at the time of the failure of the bank, the property of the administrator, in such a sense as to constitute him the shareholder within the meaning of the act.

734. 2. That the provision of the act exempting executors, administrators and trustees from personal liability was not intended to affect the liability to assessment of estates in process of settlement, but only to prevent a personal liability from running against persons acting in a trust capacity, who had received the stock for the benefit of the trust estate.

735. 3. That the fact that the assets of the estate of W. had been distributed before a demand was made for the assessment, so that the administrator had nothing in his hands, was no reason why judgment should be rendered against him, *de bonis decedentis*.

736. 4. That the liability of W. was in the nature of a contract, and as such was a personal liability, for which his estate was holden at his death. Under the Connecticut statute the settlement of an administration account and the distribution of an estate does not prevent the estate being subjected, if actually solvent, to the payment of a debt which accrued after the settlement of the estate. *Davis, Receiver of Ocean National Bank of N. Y. v. Weed*, 44 Conn. 569.

737. A defendant sued by a national bank for moneys it loaned him cannot set up as a bar that they exceeded in amount one-tenth part of its capital stock actually paid in. *Gold Mining Co. v. National Bank*, 96 U. S. 640.

738. A banking corporation chartered under the laws of this state has no power to subscribe for the stock of a railroad corporation. *Nassau Bank v. Jones*, 95 N. Y. 115.

739. The relations of a bank with its cashier are analogous to those of a principal with his agent, and the principles governing the right of disaffirming unauthorized acts of an agent are applicable to similar acts of a cashier. *Second Nat. Bank of Oswego v. Burt*, 93 N. Y. 233.

740. An attachment issued against a national bank, which is at the time insolvent is invalid (U. S. R. S., § 5242), and is not made valid by the subsequent acquisition by the bank of further capital. *Raynor v. Pac. Nat. Bank*, 93 N. Y. 371.

741. An action in the Supreme Court against a national bank need not be brought in the county where the bank is located but may be brought in any county where the plaintiff resides. *Talmage v. Third Nat. Bank*, 91 N. Y. 531.

742. A bank by the certification of a check drawn upon it, guarantees the genuineness of the signature of the drawer, represents that it has funds of the drawer in its hands sufficient to meet it, and engages that those funds shall not be withdrawn to the prejudice of any *bona*

*fide* holder of the check. The certification does not impart that the body of the check is genuine, or that the funds on deposit are absolutely applicable to the payment of the precise check certified. *Clews v. Bank of N. Y. Nat. Banking Ass.*, 89 N. Y. 418.

743. A cashier of a bank has, as incident to his office, implied authority to borrow money for it and, in the absence of any statutory restraint, to secure the loan by pledge of its property or funds; and, as regards third persons the assumption of such authority by the cashier will conclude the bank. *Kersey, as Assignee, etc., App. v. Donnell, et al.*, 94 N. Y. 168.

744. A national bank may loan on security of a mortgage if not objected to by the United States. *Nat. Bank v. Matthews*, 98 U. S.

745. The illegal cancellation of an official bond will not release the sureties on the bond from their liability for any official delinquency of their principal. *A. Rochezeau, et al. v. Wm. McJones, et al.*, 29 La. 82.

746. The cashier of a bank is not, by reason of his official position, presumed to have power to bind it as an accommodation indorser on his individual note, and the payee who fails to prove that the cashier, as such, had authority to make the indorsement, cannot recover against the bank. *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557.

747. The provision of the National Banking Act (U. S. R. S., § 5219), providing that the taxation of shares of stock of national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" requires that no greater percentage of tax on the valuation of shares shall be levied; it does not apply to an overvaluation. *Williams v. Weaver*, 75 N. Y. 30.

748. Under the act of Congress, shares of the stock of national banks may be taxed, irrespective of the fact that the capital of the bank is invested in United States securities. *Ibid.*

749. A state bank cannot enforce against any one an executory contract which it was not authorized by its charter to make. *Nassau Bank v. Jones*, 95 N. Y. 115.

750. The assessment of bank shares is not subject to a deduction for the debts of the owner, and a refusal to allow such deduction is not a violation of said provision of the act of Congress as to the rate of taxation. *Williams v. Weaver*, 75 Ind. 30.

751. Apparent authority operates only by way of estoppel and takes the place of real authority only where some person has acted upon the appearances. *People v. Bank of N. Am.*, 75 N. Y. 548.

752. Former adjudication is not an estoppel to one not a party to the action. *Springport v. Teutonic Savings Bank*, 75 N. Y. 397.

753. A corporation, like a natural person, may appear voluntarily by attorney; and such appearance gives jurisdiction to the same extent as if there was actual service of process. *In re Atty. Gen. v. Guard. Mut. L. Ins. Co.*, 77 N. Y. 272.

754. By plaintiff's charter (chap. 685, Laws of 1870), it is authorized "to grant, bargain, sell, buy or receive all kinds of property,  
\* \* \* or to hold the same in trust, or otherwise, \* \* \*



and to advance moneys, securities and credits upon any property." In an action upon two promissory notes made by defendants, their answer alleged in substance that plaintiff carried on a regular banking business, keeping an office for discounts and deposits; that the notes in question were discounted by it in the course of such business, and the proceeds credited upon its books to one of the defendants. *Held*, that said provision of its charter did not confer upon plaintiff banking powers, or authorize it to discount commercial paper; and, this being prohibited by statute to any corporation not expressly incorporated for banking purposes (1 R. S. 600, § 4; see also *id.* 712, §§ 3, 5), that the notes were void; and that the answer set up a good defence. *N. Y. S. L. and T. Co. v. Helmer*, 77 N. Y. 64.

**755.** The charter of a bank is a franchise which is not taxable as such, if a price has been paid for it, which the legislator accepted. *Gordon v. Appeal*, Tax Court, 3 How. U. S. 133.

**756.** Bank, required by charter to pay certain per cent. on its capital in lieu of all other taxes, and authorized to hold bond for its place of business, and such as may be conveyed to it to secure its debts, is exempt as to only so much real estate as is necessary for its place of business. *Bank v. Tennessee*, 104 U. S. 493.

**757.** Title deeds being deposited with bank to secure indebtedness which is paid, and later another debt incurred, bank cannot claim an equitable mortgage to secure later debt. *Biebinger v. Continental Bank*, 99 U. S. 143.

**758.** The procuring by two or more directors of the declaration of a dividend at a time when there are profits to pay it, is not a willful misapplication of money of bank within section 5204 Revised Statutes. *United States v. Britton*, 108 U. S. 199.

**759.** Nor is president liable for a criminal violation of that section solely by reason of permitting a depositor who is largely indebted to the bank to withdraw his deposit without first paying such indebtedness. *Ibid.*

**760.** A bank, in voluntary liquidation under section 5220 of Revised Statutes is not thereby dissolved as a corporation, but may sue and be sued by its corporate name. *National Bank v. Ins. Co.*, 104 U. S. 54.

**761.** In an action upon a promissory note of \$2,400, it appeared that the note was indorsed by defendant W. for the accommodation of the makers, of which fact plaintiff had notice. The note was delivered by the makers to plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by another bank, plaintiff receiving a compensation for procuring the discount. On, or prior to, the day the note fell due, the makers delivered to plaintiff another note, being one of several indorsed by W., and delivered to the makers to take up the note in suit, and other notes previously indorsed by him; plaintiff's cashier was directed to apply the proceeds to take up the paper so indorsed. It did not appear that this direction was revoked. The proceeds were credited to the makers. It did not appear that plaintiff, at that time, held any paper so indorsed by W., save the note in suit, which it had taken up. A few days after, the makers drew a check on, and delivered it to plaintiff for \$2,731.62, payable to "notes, etc., or bearer." No money was paid the drawers thereon, and it did

not appear that the proceeds of the note had been drawn out. *Held*, that the plain inference from the transaction was that the check was given to pay the note in suit, and that it was paid thereby; and that, in the absence of any proof rebutting this presumption, a finding of non-payment was error. *National Bank of Gloversville v. Wells*, 79 N. Y. 498.

**762.** It seems, that a national bank has no power to loan its credit and become an accommodation indorser of a promissory note. *National Bank of Gloversville v. Wells*, 79 N. Y. 498.

**763.** The forty-first section of the National Banking Act of June 3d, 1864—which in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under state authority, at the place where the bank is located, and not elsewhere. *Tappan, Collector v. Merchants' Nat. Bank*, 19 Wall. U. S. 490.

**764.** Though the stock of a bank be altogether owned by a State, if the bank is insolvent its assets cannot be appropriated by legislative act or otherwise to pay the debts of the State, as distinguished from the debts of the bank. Those assets are a trust fund first applicable to the payment of the debts of the bank. *Barrings v. Dabney*, 19 Wall. U. S. 1.

**765.** Although a bank, on the expiration of its charter, or the trustees who liquidate its affairs, may be deprived by statute, of power to take or hold real estate, this does not prevent either's making an arrangement through the medium of a trustee, by which, without ever paving a legal title, control, or ownership of such estate, and have the estate sold so as to pay the debt. *Zantzingers v. Gunton*, 19 Wall. U. S. 32.

**766.** Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds, and credited to the transmitting bank in account, becomes the money of the former. Hence, any depreciation in the specific bank bills received by the collecting bank, which may happen between the date of the collecting bank's receiving them and the bank's drawing for the amount collected, falls upon the former. *Marine Bank v. Fulton Bank*, 2 Wall. U. S. 252.

**767.** Where negotiable paper is drawn to a person by name, with addition of "cashier" to his name, but with no designation of the particular bank of which he was cashier, parole evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit and that in taking the paper he was acting as cashier and agent of that corporation. *Baldwin v. Bank of Newbury*, 1 Wall. U. S. 234.

**768.** National bank may be sued in any state, county, or municipal court in the county or city where located, having jurisdiction in similar cases. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. U. S. 383.

**769.** National banks do not cease corporate existence by mere default in paying circulating notes, and upon the mere appointment of a receiver. *Ibid.*

**770.** Where a bank charter is forfeited on *quo warranto* and the corporation is dissolved, any surplus of assets above its debts, by



general laws of equity, will belong to the stockholders. *Lum v. Robertson*, 6 Wall. U. S. 277.

**771.** A delinquent debtor cannot in such case plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for the benefit of the stockholders. *Ibid.*

**772.** Although a bill payable at a particular bank, to physically, and in point of fact, in the bank, still, if the bank be wholly ignorant of its being there—as when, *ex. gr.*, a letter in which the bill was transmitted when brought from the post office to the bank has been laid down with other papers on the cashier's desk, and before being taken up or seen by the cashier has slipped through a crack in the desk, and so disappeared—the fact of the bill being thus physically present in the bank does not make a presentment. *Chicoper Bank v. Philadelphia Bank*, 80 Wall. U. S. 641.

**773.** And this is so, although the acceptor held no funds then, did not call to pay the bill, and in fact did not mean to pay it anywhere. *Ibid.*

**774.** In such a case, therefore, the holder cannot look to prior parties, even though, by having been informed after inquiry by him, that the bill had not been received at the collecting bank, they could have inferred that it had not been paid at maturity by the acceptor. *Ibid.*

**775.** Under the National Banking Act of June 3d, 1864, national banks cannot, even by provisions framed with a direct view to that effect in their articles of association and by direct by-laws, acquire a lien on their own stock held by persons who are their debtors. *Bul-lard v. Bank*, 18 Wall. U. S. 589.

**776.** A by-law giving to a bank a lien on stock of its debtors is not "a regulation of the business of the bank or a regulation for the conduct of its affairs," within the meaning of the said act, and, therefore, not such a regulation as under the said act, national banks have a right to make. *Ibid.*

**777.** Under the thirtieth section of the National Banking Act, national banks may take the rate of interest allowed by the state to natural persons generally, and a higher rate, if State banks of issue are authorized by the laws of the State to take it. *Tiffany v. National Bank of Missouri*, 18 Wall. U. S. 409.

**778.** The Treasury Department has decided, on the opinion of the solicitor, that national banks are not responsible for the redemption of their notes stolen before they are signed, and put into circulation with forged signatures. *Ibid.*

**779.** Under the U. S. Stat. of 1864, c. 106, § 28, authorizing a banking corporation established under the statute to purchase, hold, and convey such real estate "as it shall purchase at sales under judgments, decrees, or mortgages held by such associations, or shall purchase to secure debts due to said association," such corporation has authority to purchase such real estate as may be necessary in order to secure a debt due to it, although in excess thereof, if the security of the debt is the real object of the purchase. *Upton v. Nat. Bank of South Reading*, 75 Mass. 153.

## THE COURTS WILL INTERFERE WITH THE POWERS OF DIRECTORS.

**780.** Although the court will not interfere with the powers and duties of directors in their management of the internal affairs of a company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers. *Cannon v. Trask*, 15 English Rep. Moak's Notes, 539.

**781.** In adjusting and compromising contested claims against it, growing out of a legitimate banking transaction, a national bank may pay a larger sum than would have been exacted in satisfaction of them, so as to thereby obtain a transfer of stocks of railroad and other corporations, in the honest belief, that by turning them into money under more favorable circumstances than then existed, a loss which it would otherwise suffer, the transaction might be averted or diminished. So, also, it may accept stocks in satisfaction of a doubtful debt, with a view to their subsequent sale or conversion into money in order to make good or reduce an anticipated loss. *First Nat. Bank of Charlotte v. Nat. Ex. Bank of Baltimore*, (2 Otto) U. S. Repts. 92, 122.

**782.** Such transaction would not amount to dealing in stocks, and they come within the general scope of the powers committed to the board of directors and the officers and agents of a national bank. Subject to such restraints as its charter and by-laws impose, they may do in this behalf whatever natural persons can lawfully do. *Ibid.*

**783.** Dealing in stocks by a national bank is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. *Ibid.*

**784.** Where a question arises under a Federal law and respects a corporation created by its authority, the rulings of the Federal courts must be followed. *Duncomb v. N. Y. H. & No. R. R. Co.*, 84 N. Y. 190.

**785.** Accordingly held, that the decision of the United States Supreme Court, in *G. M. Co. v. Nat. Bank*, (96 U. S. 64) was conclusive here, holding that a contract of loan made by a national bank was valid and could be enforced although violative of the provision of the National Banking Act (U. S. R. S., § 5200), prohibiting a loan to one individual exceeding one-tenth part of the capital of the bank. *Duncomb v. N. Y. H. & No. R. R. Co.*, 84 N. Y. 190.

**786.** When a banker receives a negotiable instrument for collection, it is his duty to cause it to be presented for payment at maturity, and if refused, protested, so as to charge the indorser. The failure to perform this duty will render him liable for damages thereby occasioned. In an action to recover for such damages the solvency of the indorser is a material inquiry. It is competent for the defendant in such action to prove that the indorser was, and continues to be insolvent, and that therefor no damages were occasioned by the failure to protest the note. *Steele v. Russell*, 5 Neb. 211.

**787.** The doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on



presentation, and pass at par value in business transactions at the place where offered. *Ward v. Smith*, 7 Wall. U. S. 447.

**788.** Stockholders of a bank whose charter binds them "respectively for all the debts of the bank in proportion to their stock therein" cannot be sued at law, there being numerous other creditors, the remedy is in equity. *Pollard v. Bailey*, 20 Wall. U. S. 520.

**789.** Rights or powers of national banks are: to exercise all such incidental powers as are necessary to carry on the business of banking, by discounting and negotiating notes, drafts, and bills; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of the act of Congress.

**790.** When title to bank stock not affected by proceedings under confiscation acts of Congress. See *Chapman v. P. N. Bank*, 85 N. Y. 437.

**791.** P and K, a firm of which defendant was a partner, executed to a State bank a written undertaking to be "responsible for the payment of any sum not to exceed" \$5,000, which W might require of said bank "for legitimate business purposes." *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**792.** The said State bank, after loans had been made to W, upon the faith of the guaranty, abandoned its state organization, and was recognized as a national bank, as authorized by the act of 1865. (Chap. 97, Laws of 1865). A portion of said loans had not been paid, new notes having been given in renewal. In an action upon the guaranty the complaint averred that the guaranty was to the plaintiff instead of to its predecessor, the State bank. The complaint was dismissed on trial.

**793.** It did not appear that the failure to sustain the complaint by proof, in this respect, was made or relied upon at the trial. *Held*, that while, if the point had been specifically taken, and the dismissal had been placed upon that ground, and there had been no motion made and denied for an amendment, the ruling might be sustained, it could not be presumed that the trial court placed its decision upon a ground so little affecting the merits. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**794.** C and B were the trustees of an estate, B being the acting trustee and having the exclusive management; he employed L as his clerk and agent for the collection of rent. Acting as such agent, L received a check for rent due the estate, payable to the order of B; this L indorsed payable to his own order, signing the name of B, per himself as attorney, and then indorsed it "for deposit" with defendant, signing his own name. He deposited the check with defendant, who collected it and placed it to the credit of L, and the latter subsequently checked out the same for his own use. In an action for a conversion of the check, *held*, that L had no authority to indorse or use the check or its proceeds, and defendant, as against B or the trustees, was not authorized to collect and appropriate the proceeds, and was therefore liable. *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404.

**795.** Also *held*, that plaintiffs, who were the successors of C and B, had sufficient title to maintain the action. *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404.

**796.** P. and K., a firm of which defendant was a partner, executed

to a State bank a written undertaking to be "responsible for the payment of any sum not to exceed" \$5,000, which W. might require of said bank "for legitimate business purposes." The said State bank, after loans had been made to W., upon the faith of the guaranty, abandoned its state organization, and was reorganized as a national bank, as authorized by the act of 1865 (Chap. 97, Laws of 1865). A portion of said loans had not been paid, new notes having been given in renewal. *Held*, that for whatever sum the defendant was bound to the State bank, when it was reorganized, that indebtedness passed to plaintiff; and, conceding that plaintiff could not renew without the assent of defendant, or make fresh advances and still hold him liable, it had the right to enforce the liability to the State bank. *City Nat. Bank v. Phelps*, 86 N. Y. 484. See *Savings Bank*.

**797.** A banker, who was a director of an insurance company, can set off against its demands for money it deposited with him, bearing interest and payable on call, the amount due on its policies issued to and held by him. *Seammon v. Kimball Assignee*, (2 Otto) U. S. Repts. 92, 362.

**798.** The company having been adjudicated a bankrupt, his right to such a set-off is equally available against its assignee. *Ibid*.

**799.** Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent. *Lerry v. Lubman*, (2 Otto) U. S. Repts. 92, 156.

**800.** The fact that a loan made by a national bank is in excess of the limit allowed by law, cannot be used to defeat the collection of the loan by the bank. *Mills Co. Nat. Bank v. Perry*, 72 Iowa, 15.

**801.** The firm of R. Bros., ship brokers, having become embarrassed in business caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their bookkeeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for said firm, when it became due charged it to said account and refused to pay over the amount so deducted to plaintiff. In an action to recover the amount so retained, *held*, that defendant was not entitled to set off the amount of the note against the deposits, as the deposits were not the property of R. Bros., but were deposited and held in trust for the benefit of those for whom the moneys were received. *Falkland v. St. N. National Bank*, 84 N. Y. 145.

**802.** Also *held*, that it was immaterial that none of the parties entitled to the deposits had made claim therefor, as they could enforce their claims against the plaintiff. *Falkland v. St. N. National Bank*, 84 N. Y. 145.

**803.** Also *held*, that it was immaterial that defendant was not notified that said intestate so held the funds in trust; that the deposits being in his name he was under no obligation to give notice that others had an interest therein. *Falkland v. St. N. National Bank*, 84 N. Y. 145.

**804.** Also *held*, that the discharge of R. Bros. in bankruptcy did



not affect the rights of the parties for whose benefit these deposits were made; that such discharge, while it might destroy the claims against the firm, did not deprive those for whom the funds were deposited of their right thereto. *Falkland v. St. N. National Bank*, 84 N. Y. 145.

**805.** The L. & I. Co. by its charter (§ 5, chap. 730, Laws of 1871) is authorized to "advance moneys \* \* \* upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced. *Duncomb v. N. Y., H. & N. R. R. Co.*, 84 N. Y. 190.

**806.** When forged checks have been paid by a bank, charged in the depositor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud; at most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209.

**807.** Where, therefore, checks forged by plaintiffs' confidential clerk, who filled out their checks and had charge of their bank account, were paid by defendant, charged to plaintiffs in their pass book, the book balanced and the checks, including those forged, returned to the clerk, who assisted one of the plaintiffs in examining the account, which examination was made whenever the pass book was written up, and vouchers returned, and the clerk by abstracting the forged vouchers, and by false balances and readings, prevented the forgeries from being discovered, *held*, that plaintiffs were not estopped from questioning the accuracy of the account; and that defendant was liable for the balance, deducting the forged checks. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209.

**808.** Where a married woman is the owner of stock, of a bank located in a state other than that in which she and her husband are domiciled, the effect of payment, by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile. *Graham v. First Nat. Bank, Norfolk*, 84 N. Y. 393.

**809.** E., a married woman domiciled with her husband in Maryland, was the owner of certain shares of stock of a Virginia bank; in the latter state the rule of the common law as to the relations of husband and wife prevails. The husband was cashier of two Maryland banks, in both of which he was largely interested, and of which he was the controlling agent; with these banks the Virginia bank had accounts kept in the name of the husband as cashier; by his direction or with his assent various dividends declared upon said shares of stock were paid to said banks or credited in their accounts and allowed them on settlement. In an action by assignees of the wife to recover the dividends, *held*, that the evidence justified a finding of payment of

the dividends to the husband; and that such payment was good as against the wife or her assignees and discharged defendant's liability. *Graham v. First Nat. Bank, Norfolk*, 84 N. Y. 393.

**810.** Deposit by husband in name of wife belongs to her. *McGraw v. Tatham*, (Mem.) 84 N. Y. 677.

**811.** A check is a bill of exchange within the statute (1 R. S. 768, § 6), declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance is in writing. *Risley v. Phenix Bank*, 83 N. Y. 318.

**812.** A verbal promise by a bank therefore to pay a check does not create a cause of action thereon. *Risley v. Phenix Bank*, 83 N. Y. 318.

**813.** Where, concurrently with the giving of a check for a portion of the amount standing to the credit of the drawer upon the books of defendant, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and receive the portion of the debt assigned, *held*, that the check was not the contract between the parties, and so did not render oral evidence of the agreement inadmissible; and that the parol assignment was sufficient to vest in the plaintiff a title to the portion of the debt assigned. *Risley v. Phenix Bank*, 83 N. Y. 318.

**814.** Plaintiff presented the check, and demanded payment, January 4, 1865, notifying defendant that so much of the claim of the drawer as was represented by the check had been transferred to him; defendant's president promised to pay on presentation by some person known to the bank. On the next day when the check was again presented, defendant refused to pay, on the ground that on the morning of that day the debt had been seized by the United States, in pursuance of proceedings instituted on that day, under the confiscation acts of Congress. These proceedings were set up as a defence, and on the trial defendant, to sustain the defence, offered in evidence the record of a District Court of the United States, showing that the deposit to the credit of the drawer was attached in proceedings against the estate, property, etc., of the bank of G. (the drawer), on deposit with the defendant on January 5, 1865, and that defendant paid over to the marshal, in pursuance of a decree of said court in such proceedings, the whole amount of the credit. The assignment to plaintiff was made in May, 1861, before the passage of the confiscation acts. *Held*, that the record constituted no defence, and was properly excluded; that if notice to defendant was necessary to complete plaintiff's title, sufficient notice was given the day prior to the seizure; that the plaintiff was not concluded by the adjudication of the District Court to the effect that the property seized belonged to the bank of G.; also that the District Court acquired no jurisdiction under said acts to proceed for the forfeiture of a debt owing to a corporation. *Risley v. Phenix Bank*, 83 N. Y. 318.

**815.** The courts will take judicial notice of the general course of business in a community, including the universal practice of banks. *Mer. Nat. Bank v. Hall*, 83 N. Y. 338.

**816.** Under the act of Congress of February 10th, 1868, and the



act of the Legislature of Pennsylvania of March 30th, 1870, shares in national banks may be valued for taxation for county, school, municipal, and local purposes, at an amount above their par value. *Stephenson v. The School Directors*, 23 Wall. U. S.

**817.** In March, 1870, plaintiffs drew their check on defendant against funds on deposit, receiving its check on the M. N. Bank for the amount, payable to the order of H, to whom plaintiffs proposed to loan the amount on her bond and mortgage. The loan had been negotiated by B, plaintiffs' attorney, who had procured the signature of H to the bond and mortgage without knowledge on her part of the nature of the instruments. The check was certified by the M. N. Bank, the indorsement of H was forged thereto, it was deposited by B with his bankers, and was subsequently paid by the drawee, and the amount charged to defendant. B procured the mortgage to be recorded and sent the papers to plaintiffs, who resided in Canada. B paid the interest on the bond and mortgage until May, 1876, when he disappeared and the fraud was discovered. In an action brought to open the accounts between the parties, which had been settled, and to recover the amount of said check, *held*, that in the absence of evidence that the certification of the check was obtained by plaintiffs or their authorized agent, or that the claim of defendant upon the M. N. Bank had been barred by the statute of limitations before notice of the forgery and demand of payment, plaintiffs were entitled to the relief sought; that the M. N. Bank having paid the check on a forged indorsement was the party in default who should sustain the ultimate loss; but inasmuch as from what appeared in the case defendant was the only party to whom that bank was liable, equity required it should make good the payment for which it had received credit and seek its reimbursement from the M. N. Bank. *Thomson v. Bank of British N. Am.*, 82 N. Y. 1.

**818.** It seems that had the plaintiffs procured the certification of the check, it would have been regarded as between them and defendant as paid, and they could not have recovered, their remedy being against the drawee. *Thomson v. Bank of British N. Am.*, 82 N. Y. 1.

**819.** It seems, also, that had it appeared that the delay of the plaintiffs in discovering and giving notice of the forgery had caused the defendant's remedy over against the M. N. Bank to be barred by the statute of limitations, plaintiffs would not have been entitled to have the account opened. *Thomson v. Bank of British N. Am.*, 82 N. Y. 1.

**820.** The lapse of six years is not a bar to an action to recover a deposit; the statute of limitations only begins to run from the time payment is refused. *Thomson v. Bank of British N. Am.*, 82 N. Y. 1.

**821.** The firm of C. F. P. & Co. made their promissory note payable to their order and indorsed the same. L, one of the firm and also a member of the firm of J. S's Sons, indorsed his own name and the name of the latter firm thereon without their knowledge or consent, and delivered it to a firm to whom he was individually indebted to be applied upon the debt, who transferred the note to plaintiff for value, before maturity, plaintiff having no notice of the circumstances attending the execution of the note. One of the firm to whom L transferred

the note was one of the directors of the plaintiff. In an action upon the note, *held*, that it was not thereby made chargeable with, or affected by, his knowledge of the transaction; that the knowledge acquired by him, not as an officer of the plaintiff or while engaged in its business, but in an individual capacity could not operate to its prejudice; nor was there any presumption that he communicated it to plaintiff. *At. State Bank v. Savery*, 82 N. Y. 291.

**822.** The purchase of a promissory note for a sum less than its face is a discount thereof within the meaning of the provision of the Banking Act of this State (§ 18, chap. 260, Laws of 1838), which authorizes associations organized under it to discount bills, notes, etc. *At. State Bank v. Savery*, 82 N. Y. 291.

**823.** Plaintiff was organized under said act. The note in question was purchased by it at a greater discount than lawful interest. *Held*, that this did not invalidate its title; that if any penalty was incurred thereby (as to which *quoere*), it was only the penalty prescribed by the act (see amendment, chap. 193, Laws of 1870); that this was not available as a defence as it was not set up in the answer. *At. State Bank v. Savery*, 82 N. Y. 291.

**824.** It seems that it would not have availed if it had been pleaded. *At. State Bank v. Savery*, 82 N. Y. 291.

**825.** Also, *held*, that the violation of the statute was not a fact affecting the good faith of plaintiff as holder of the paper. *At. State Bank v. Savery*, 82 N. Y. 291.

**826.** Also, *held*, that if the purchase of the note was beyond the scope of plaintiff's powers as defined by the act under which it was organized, it would not avail defendants. *At. State Bank v. Savery*, 82 N. Y. 291.

**827.** The Supreme Court of this State has jurisdiction over an action *ex contractu* brought by a citizen of the state against a national bank located in another State. *Robinson v. Nat. Bank of Newberne*, 81 N. Y. 385.

**828.** The provision of the National Banking Act (U. S. R. S., § 5798) authorizing suits against the banking associations organized under it, to be brought in the court of the county or city of the state in which the association is located, does not have the effect to deprive other courts of jurisdiction; it is permissive, not mandatory, and therefore does not limit the general rule permitting civil cases arising under the laws of the United States to be prosecuted and determined in the State courts, where no exclusive jurisdiction has been vested in the Federal courts, or the State courts have not been prohibited from entertaining jurisdiction. *Robinson v. Nat. Bank of Newberne*, 81 N. Y. 385.

**829.** In an action brought to recover the amount of a promissory note discounted by a national bank, it cannot be set up by way of counterclaim or set-off that the bank, in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than that allowed by law. *Nat. Bank of Auburn v. Lewis*, 81 N. Y. 15.

**830.** The remedy in such case is an action of debt to recover back twice the amount paid. *Nat. Bank of Auburn v. Lewis*, 81 N. Y. 15.

**831.** The rule laid down in this case upon a former argument



(*Nat. Bank of A. v. Lewis*, 75 N. Y. 516), modified as above in conformity with decision in *Barnet v. Nat. Bank* (98 U. S. [8 Otto] 555), which the court hold to be controlling. *Nat. Bank of Auburn v. Lewis*, 81 N. Y. 15.

**832.** Although State courts have concurrent jurisdiction with the Federal courts in actions by and against national banks, in an action in a State court the practice and pleadings prescribed by the Legislature of the State in regard to a counterclaim or recoupment cannot be resorted to, so as to defeat the object and intention of a federal enactment. *Nat. Bank of Auburn v. Lewis*, 81 N. Y. 15.

**833.** The provision of the U. S. Statute (§ 914), providing that the practice, pleadings, forms and modes of proceedings, in civil causes, in the Circuit and District Courts, shall conform, as near as may be, to those existing at the time in the courts of record of the State, has no application in such case; it cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character. *Nat. Bank of Auburn v. Lewis*, 81 N. Y. 15.

**834.** Where, however, a national bank, in the discount of a note, has usuriously reserved a sum greater than the lawful rate of interest, the amount so reserved is forfeited (U. S. R. S., § 5198), and cannot be recovered in an action upon the note. *Nat. Bank of Auburn v. Lewis*, 81 N. Y. 15.

**835.** In such an action an attachment may be issued against the property of the defendant in this State. *Robinson v. Nat Bank of Newburne*, 81 N. Y. 385.

**836.** The provision of said act (§ 5242) prohibiting the issuing of an attachment, injunction or execution against such an association or its property before final judgment, applies only to an association which has become insolvent or to one about to become so, as specified in the preceding part of the section. *Robinson v. Nat. Bank of Newburne*, 81 N. Y. 385.

**837.** Plaintiff deposited with defendant, for collection, a note to which there was no indorser save the maker, payable at the bank of Lowville, of which bank the maker was a customer. Defendant sent the note by mail to that bank, which was an ordinary method of transacting such business. The note reached said bank the day it fell due; upon the next day it sent its draft on New York in payment, and on the same day failed. The maker had not quite sufficient on deposit to pay the note; the deficit was made up after the failure. Defendant received the draft the next day, which was Saturday, after business hours; he forwarded it on Monday morning, in the usual course of business, to the clearing-house in New York, and it was returned "not good." Defendant immediately gave plaintiff notice of non-payment. In an action to recover the amount of the note, because of alleged negligence, *held* (Miller, Earl and Danforth JJ., dissenting), that plaintiff was properly non-suited; that as there was no evidence that the maker was insolvent, it did not appear that plaintiff sustained any damage; that the receipt of the draft was not a payment, and did not discharge him from liability. *Indig v. Nat. City Bank*, 80 N. Y. 100.

**838.** Also, *held*, by Rapallo, Folger and Andrews, JJ., (Miller, Earl and Danforth, JJ., dissenting), that by sending the note to the Bank of Lowville by mail, defendant did not constitute that bank its

agent to receive payment, but simply presented the draft through the mail for payment; that no relation was created between defendant and said bank by presentment in this manner different from what would have existed had the note been sent through any other agency; that if presented by a subagent the latter would have been justified in accepting a draft for the amount; also, that there was no negligence in forwarding the draft. *Indig v. Nat. City Bank*, 80 N. Y. 100.

**839.** One B. was in March, 1874, cashier of defendant, the National Bank of Fishkill, and its managing officer and general agent; he was also plaintiff's treasurer. He took certain bonds belonging to plaintiff which, in the name and as cashier and manager officer of said defendant, he pledged, with various parties as securities for loans. In January, 1876, B. repossessed himself of the bonds, and returned them to plaintiff, but on the thirty-first of that month again took them, and in the same manner pledged them with W, and Mc M., a banking firm, as security for advances made and to be made to defendant; the bonds were subsequently sold pursuant to the conditions of the pledge, and the proceeds credited to said defendant. In an action for conversion of the bonds, *held*, that said defendant was liable; that ignorance on the part of its directors was not a defence, as, if ignorant, it was because they omitted the performance of official duty; that although B. had no authority to take the bonds, when he pledged them he represented the bank, and his knowledge was notice to it. *Fishkill Savings Inst. v. Nat. Bank of F.*, 80 N. Y. 162.

**840.** Also, *held*, that a counterclaim could not be allowed in such an action. *Fishkill Savings Inst. v. Nat. Bank of F.*, 80 N. Y. 162.

**841.** The term "individual banker," in the provision of the act of 1875, relating to savings banks (§ 49, chap. 371, Laws of 1875), which declares it "not to be lawful for any bank, banking association or individual banker to advertise or put forth a sign as a savings bank," applies only to one who has availed himself of the banking statutes of this state, and has become empowered to do banking thereunder; it does not apply to a private banker, who exercises in his business no more than the rights and privileges common to all. *People v. Doty*, 80 N. Y. 225.

**842.** Defendant and one W were engaged in conducting a banking business in a building owned by defendant. They were not organized as bankers. Nor was either of them authorized to do banking business under the banking laws of the State. They did business under the name of "The Farmers' Bank of Batavia." Defendant caused to be placed in plain sight, on the outside of the building, the words "L. Doty's Savings Bank." In an action to recover penalties, under said act of 1875, for putting "forth a sign as a savings bank," *held*, that defendant was not an "individual banker," within the meaning of said act; and that, therefore, the action was not maintainable. *People v. Doty*, 80 N. Y. 225.

**843.** The various banking acts expressive of the legislative intent in the use of the term "individual banker" collated. *People v. Doty*, 80 N. Y. 225.

**844.** It seems, that the proper phrase to designate a banker doing business without having acquired the privileges conferred by the provisions of the statute, is "private banker," not "individual banker." *People v. Doty*, 80 N. Y. 225.



**845.** Building erected by bank on leased land is real property for purposes of taxation, and value to be deducted from value of shares in assessing stockholders. *People, ex rel. v. Comrs., Etc.*, 80 N. Y. 573.

**846.** The power to receive special deposits is incidental to the business of banking. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**847.** The enumeration of banking powers in the National Banking Act is not significant of an intention to place any special restrictions upon national banks as distinguished from state banks. The enumeration is of the general, not the incidental powers. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**848.** National banks, therefore, have power to receive special deposits gratuitously or otherwise; and when received gratuitously, they are liable for their loss by gross negligence. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**849.** When a national bank has habitually received such deposits, this liability attaches to a deposit received in the usual way. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**850.** The term "special deposits" includes money, securities and other valuables delivered to banks, to be specifically kept and redelivered; it is not confined to securities held by the banks as collateral to loans. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**851.** In an action to recover damages for a special deposit alleged to have been lost through defendant's gross negligence, it appeared that plaintiff delivered to defendant's teller, at its bank, for safe keeping, a package containing certain bonds. Defendant had been accustomed to receive for that purpose, packages supposed to contain securities and valuables. Some of these were left by its directors. The cashier of the bank had the control and management of its affairs. It did not appear that the president took any part in its management or, that the directors held any meetings. The teller sometimes acted as cashier in his absence. Some time before the deposit, the cashier said something to the teller as to their not taking any more packages for safe keeping. The teller testified that this was not a positive instruction, but merely an opinion, and that he did, after that, receive packages. He also testified that he told plaintiff when the deposit was made, that it would be at his own risk; this was contradicted by plaintiff. The teller also testified that the cashier sometimes told persons depositing packages that they would be at their own risk, and at other occasions packages were received without such notice. The package so left by plaintiff was kept in defendant's bank for about two years before its loss, being occasionally taken out by him to cut off coupons, and then returned. *Held*, that the evidence justified the submission to the jury of the question of the authority of the teller, and whether the deposit was with the bank; and, this having been found, that defendant was bound to return the bonds when demanded, or to show some sufficient ground for not doing so. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**852.** There was no direct explanation of the manner of the loss, but the evidence tended to show that the bonds were stolen in the day time, when the bank was open. They were kept in a safe, so placed as to be accessible to any person entering the bank from the street, while those in the bank were so placed that at times the safe was not in their

view, and sometimes the door of the safe was left open. *Held*, that the evidence authorized a finding, that the bonds were stolen by some one coming in from the street; and that leaving the property thus exposed was gross negligence. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**853.** Also, *held*, that the fact that property of the bank was stolen from the same place, at the same time, was not conclusive against the charge of gross negligence. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**854.** As to whether, assuming the receipt of special deposits to have been beyond the legal power conferred upon defendant, yet having in fact received plaintiff's property into its custody, it could set up its own want of corporate power as a defence, *quoere*. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**855.** The authorities upon the subject of the liability of banks for special deposits collated. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

**856.** The C. N. Bank, having received from a customer of the M. and M. Bank a check upon that bank, sent it to the drawee for payment; the M. and M. Bank charged the check to the drawer, whose account was then good for the amount, and returned the check to the drawer as paid; it sent to the C. N. Bank a draft on a New York bank for the amount of the check; two days after the M. and M. Bank closed its doors and a receiver of its assets was appointed; the draft was not paid. On application by the C. N. Bank for an order requiring the receiver to pay the amount of the check, upon the ground that the assets came to the hands of the receiver impressed with a trust in favor of the C. N. Bank, *held*, that the order was properly denied; that in order to authorize the relief prayed for it was necessary to trace into the hands of the receiver money or property which belonged to the C. N. Bank, or which had, before the receivership, been set apart and appropriated to the payment of the check; that charging said check and returning it to the drawer did not amount to a payment and setting apart of sufficient of the drawer's deposit to cover it, nor did it impress a special trust on any part of the drawer's assets; but by the transaction the drawee simply reduced its indebtedness to its depositor to the amount of the check, and constituted itself a debtor to the holder to a corresponding amount. *People v. Mer. and Mech. Bank*, 78 N. Y. 269.

**857.** Defendant, as collateral security for a loan made to him by a bank, delivered to it certain securities, which were taken and converted by B., the president of the bank. In an action by the receiver of the bank to recover the amount loaned it appeared and was found that the trustees of the bank left the entire management of it with B. and one O., who was styled "manager;" that the trustees took the statement of B. without question or examination; that the securities were taken without objection on the part of the trustees or officers; that no meetings of the trustees were held pursuant to the by-laws, or examination made by them of the securities, and they exercised no care or vigilance in regard to them; also, that B. had been in the habit of abstracting securities and using them in his private business, most of them being returned when called for; that O. had knowledge of this habit and took no means to prevent it, or to notify the trustees. *Held*, that the bank was chargeable with negligence, and defendant was entitled to counterclaim the value of the securities; that the bailment was for



mutual benefit, and in such case the bailee was bound at least to exercise ordinary care; also, that the bank was under an implied obligation by the transaction to return the securities when the debt was paid; that the failure to do so rendered it presumptively liable, and the onus was upon it to relieve itself from that; also, *held*, that the bank was not excused, by the fact that B. having access to the securities might have abstracted them secretly, although the utmost vigilance had been used, as the point was whether care or diligence would have prevented what was actually done. *Cutting v. Marlor*, 78 N. Y. 454.

**858.** Defendant and others executed a bond, by the terms of which each one severally obligated himself to pay a separate and specified sum to the Third Avenue Savings Bank, on the 1st day of January, 1883, "or six months after a demand therefor." When the bond was given the assets of the bank had become impaired, and the bond was executed for the purpose of being exhibited to the bank department as an asset, so that the bank might pass examination and be enabled to continue its business. *Hurd v. Kelly*, 78 N. Y. 588.

**859.** In an action by a receiver of the bank upon the bond, *held*, that the intent to be gleaned from the language of the bond was to fix the day specified as the date when the obligation should mature, in the absence of any prior demand, and to enable the bank to accelerate the time of payment by a six months' demand; that the circumstances, under which the bond was given, confirm this construction; and that, therefore, an action brought before the day specified, but six months after demand, was not premature. *Hurd v. Kelly*, 78 N. Y. 588.

**860.** The consideration expressed in the bond was that said bank, upon the request of each of the obligors, continues its business after January 15th, 1873, and of the mutual covenants contained therein. The bank did continue in business after the time specified and until December, 1875, when plaintiff was appointed receiver. *Held*, that the continuance in business, and the incurring of new obligations incident thereto, was a good consideration. *Hurd v. Kelly*, 78 N. Y. 588.

**861.** Also, *held*, that the transaction was not in violation of public policy, and even if it was *ultra vires*, that objection could not prevail as against the claims of depositors who are represented by the receiver. *Hurd v. Kelly*, 78 N. Y. 588.

**862.** What are proper allowances on settlement of accounts of receiver of insolvent savings bank. *In re G. Sav. Institution*, 78 N. Y. 408.

**863.** Bank stock assessed under the provisions of the act authorizing the taxation of stockholders of banks (Chap. 761, Laws of 1866), it is the duty of the assessor to deduct from the actual value of each share, a sum bearing the same proportion thereto as the annexed value of all the capital stock; the words "whole amount of the capital stock," as used in said act, has reference to its value, not to the nominal amount of capital. *People, ex rel. v. Com'r's of Taxes*, 69 N. Y. 91.

**864.** Article 13 of the State constitution, entitled "Banks and currency," applies to banks of issue, and does not prohibit the Legislature from creating banks of deposit and discount. When an incorporation, attempted in good faith under a general incorporation law, by

the requisite number of corporators, will be deemed a corporation *de facto*. *Pape v. Capital Bank*, 20 Kansas, 440.

**865.** When a bank has become involved and under the general laws it is sought to make the directors and stockholders liable for its debts, proceedings must be in the name of the assignee, and in the Court of Common Pleas of the County in which the bank is located. The liability of the stockholders being secondary cannot be enforced until the assets of the bank, which is the primary debtor, are exhausted. *Mean's Appeal*, 85 Penn. St. 75.

**866.** The stockholder of a national bank has legal capacity to sue such corporation for misappropriation of the stockholder's funds, and for other causes. A corporation being a legal entity, as such, distinct from its members, incorporators, or stockholders, it follows that each or all of them may have grievances redressed by actions at law or proceedings in chancery, as any creditor not occupying that relation. *Wilson v. First National Bank*, 1 Wyoming, S. C. Rps. 108.

**867.** Money paid to the cashier of a bank for the use and benefit of the bank, is payment to the bank itself. If such cashier misapply the funds so received, the bank, as his principal, can maintain an action against him, but not the person paying the money. If the latter suffer injury by reason of such misapplication, his remedy lies against the bank and not against its officer or servant. An agent receiving money from a third person for his principal, if he acted within the scope of his authority, and has the right to receive such payment, is not responsible to the third person; payment to the agent is payment to the principal, who is responsible for the default of the agent. *Wilson v. Rogers*, 1 Wyoming Sup. Ct. R. 51.

**868.** Under the general power of discounting negotiable notes, granted by section 127 of the corporation law to savings associations, such institutions have the power to purchase such notes. *Pape v. Capital Bank*, 20 Kansas, 440.

**869.** Banks organized, prior to the Amendment of General St. c. § 13, under the provisions of that chapter had no power to purchase or traffic in promissory notes as choses in action, or as a specie of personal property. The power to carry on the business of banking, by discounting bills, notes, and other evidences of debt, is not within the meaning of that section, a power to buy such securities, but to loan money thereon, with the right to take lawful interest in advance. In *First National Bank of Rochester v. Pierson*, decided September 21, 1877 (to appear in 24 Minn.), the rule laid down in this case was held to apply to national banks. *Farmer's and Mechanic's Bank v. Baldwin*, 23 Minn. 198.

**870.** Under Section 23, Chapter 34, laws of 1876, a private banker is subject to taxation upon the average amount of deposits made by him in his business. *Knox v. Comm'rs of Shawnee Co.*, 20 Kansas, 596.

**871.** I., the president of a national bank in Nebraska City, obtained from K., in the city of Omaha, his (K.'s) promissory note for the sum of \$2,000, payable to I. or order, and payable on demand, for the purpose of purchasing stock in the bank of which he was president. I. procured the note to be discounted by his bank, and had the proceeds thereof placed to his credit therein, and he afterwards drew the



same out by checks on the bank. None of the officers of the bank, except the president, were aware of the character of the note, or that it had been given for stock, *held* in an action on the note, that the bank was entitled to recover. *Kennedy v. Oloo Co. Nat. Bank*, 7 Neb. 59.

**872.** Like other agents, the president of a bank must act within the scope of his authority, in order to bind his principal, unless his acts have been ratified. *Ibid.*

**873.** The word "discount" signifies, "The act of buying a bill of exchange, or promissory note, for a less sum than that which upon its face is payable." *Pape v. Capital Bank*, 20 Kansas, 451.

**874.** A bank may maintain an action in its corporate name to recover back a tax illegally assessed and collected against its shares of capital stock, though such stock stands in the names of different individual shareholders. The payment of the illegal portion of the tax being one for which the shareholders were not responsible. *Kimball v. Corn Exchange Nat. Bank*, 1 Bradwell's Ill. App. R'pts. 209.

**875.** The banker having put the money for a check on the counter and the payee having taken it up, the payment is complete though the counting is not finished. *Chambers v. Miller*, C. vi. 125; 13 C. B. N. S. 125, (Eng. Com. Law.)

**876.** A country banker receiving a check on another country banker in another town, has until the next day to transmit it for presentment. *Hare v. Henty*, C. 65, 10 C. B. N. S. 65, (Eng. Com. Law.)

**877.** A bank discounting a note before its maturity is not chargeable with the knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity; such director not having acted with the board in making the discount. A director offering a note of which he is owner to the bank of which he is a director, for discount, is regarded in the transaction as a stranger, and the bank is not chargeable with the knowledge of such director of an infirmity or defect in the consideration of the note. P. was a member of the firm of M. & J. S. P., and also a director of the bank of H. He obtained at the bank the discount of a note belonging to the firm, which had been got of the maker by fraud. He had notice, as a member of the firm, of the fraud, before the note was offered for discount, but did not communicate his knowledge to any of the officers of the bank. *Held*, that the knowledge of P. was not, constructively, notice to the bank. *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. R. 435.

**878.** Persons who hold stock in pledge, the certificates of which stand on the books of a national bank in the name of the pledgee, are in contemplation of the National Banking Act, stockholders, and so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. But a sale of the stock under an authority conferred by the terms of the pledge, is not obnoxious to the charge of having been done in fraud of creditors, although its leading object and purpose may have been on the part of the pledgee to avoid liability as a stockholder, under the twelfth section of the National Banking Act, which provides for the personal liability of stockholders of national banks for the debts of the corporation, in proportion to the amount of stock held by them, and enacts that every person becoming a shareholder by transfer, shall suc-

ceed to all the rights and liabilities of the prior holder of such shares. *Magruder Receiver v. Colston, et. al.*, 44 Md. 349.

**879.** The provisions of the act of 1875, in relation to savings banks (§ 48, chap. 371, Laws of 1875), providing that savings banks shall have a preference for moneys deposited over other creditors of an insolvent bank, only applies to deposits made in the ordinary course of business, and subject to the drafts of the depositors, to an amount not exceeding that authorized by section 27 of said act. Loans, whether on time or payable on call, are not deposits within the meaning of said provisions. A loan cannot be changed into a deposit by reason of any want of authority in the managers of the savings bank to make the loan, or for the reason that it may have been made in violation of law. *Rosenback v. M. & B. Bank*, 69 N. Y. 358.

**880.** A national bank has corporate power to enter into an agreement with a customer to exchange for him non-registered U. S. bonds for registered bonds, and it is bound by an agreement to that effect made for a sufficient consideration by its cashier. *Yerkes v. National Bank*, 69 N. Y. 382.

**881.** Where it is sought to hold one who, while president of a bank, loaned moneys of the bank to an irresponsible person, liable for the same on the basis of his representations to the cashier at the time of the loans that he was interested with the borrower, and would see the amounts repaid, it is error to permit the party to testify whether he ever regarded himself as liable; his opinion respecting his legal liability had no bearing on the case. *First National Bank of Sturgis v. Reed*, 36 Mich. 263.

**882.** A bank president who, while in general charge of the business with the cashier under his authority, has permitted and directed drawing of moneys from the bank without security by one known or supposed to be irresponsible, and with whom he was interested in the business for which the money was obtained, and has requested the cashier not to say anything to the directors about it, is held personally liable to the bank for the moneys thus paid out by him in violation of his trust. *Ibid.*

**883.** The fact that the moneys thus drawn out were by the cashier, by direction and on the authority of the president, charged on the books of the bank to the irresponsible borrower, would not necessarily determine the transaction as a loan to him by the bank; but the bank, in the absence of any act of ratification or acquiescence on its part, would have a right, under the circumstances, to repudiate it as a transaction with the nominal borrower, and to insist on repayment by its president. *Ibid.*

**884.** And such president, if he persuaded the cashier not to make known the facts to the directors, could claim nothing because of the cashier's knowledge; that officer's silence might, under such circumstances, make him accessory to the fraud, but could not tend to excuse the principal. *Ibid.*

**885.** The question of the effect to be given to the long silence of the bank directors after the charge to the nominal borrower was entered upon the bank books, is one of ratification, and should be submitted to the jury as such. *Ibid.*

**886.** An agent's admissions made after the fact, and entirely un-



connected with any act of agency, are not evidence of the fact. *Bowen v. School District, etc.*, 36 Mich. 1.

**887.** Proof that a person is clerk for another does not establish his right to receive for his employer payment of demands not shown to have any connection with the business; and evidence simply that payment was made to such clerk of such demands, is not a sufficient showing of agency to receive the same, to authorize evidence of admissions by such clerk of the payment thereof to him. *Ibid.*

**888.** The Third National Bank of Baltimore was organized under the National Currency Act of 1864, ch. 106. The firm of W. A. B. & Co., of which W. A. B. was the senior member, was a large customer of the bank through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th day of February, 1866, the firm was indebted to the bank about \$5,000, when the appellee voluntarily proposed to the president of the bank, to deposit with the bank a large amount of bonds, about \$37,000, as collateral security for his present and further indebtedness. The terms of the deposit as agreed on between M. Boyd and the president, were dictated by the latter to the discount clerk—and were as follows: Third National Bank, February 5th, 1866. William A. Boyd has deposited with the Third National Bank of Baltimore, \$20,000 in United States 5–20 bonds, and \$1,500 5–20 July, 1865; \$5,000 Hudson County, New Jersey; \$5,000 Town of Saratoga, New York, 7 per cent. bonds; \$5,000 Stock of Third National Bank of Baltimore, as collateral security for the payment of all obligations of Wm. A. Boyd and Wm. A. Boyd & Co., to the Third National Bank of Baltimore, at present existing, or that may be incurred hereafter, with the understanding that the right to sell the above collaterals in satisfaction of such obligations, is hereby vested in the officers of the *Third National Bank*. (Signed) A. H. Barnitz, "Discount Clerk." "The firm was not indebted to the bank subsequent to July, 1872, when it paid its last indebtedness the bonds were not withdrawn, but left with the defendant, under the original agreement. The bank was robbed and the bonds stolen in the manner described in the testimony, between Saturday evening the 17th, and Monday morning the 19th of August, 1872; the bank was entered by burglars and certain of the bonds were stolen.

**889.** By section 8 of the Act of Congress of 1864, ch. 106, a bank organized thereunder, is authorized to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this Act." In an action by W. A. B. against the bank, to recover the value of the bonds which were stolen, it was held, 1st, That the contract entered into by the bank was not a mere gratuitous bailment. 2d, That the bank had the power to enter into the contract, it being within the terms of the Act of Congress. 3d, That the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the plaintiff's debt had been paid. 4th, That the defendant was responsible if the bonds were stolen in consequence of its failure to exercise such

care and diligence in their custody or keeping as at the time, banks of common prudence in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequences likely to arise from any improvidence on the part of the defendant. 5th, That the proper measure of damages was the market value of the bonds at the time they were stolen. Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide. *Third National Bank v. Boyd*, 44 Md. 47.

**890.** One dealing with a corporation in matters not falling within the purview of its delegated powers, is not thereby estopped from pleading its want of authority, to make the contract sought to be enforced against him. *Marion Savings Bank v. Dunkin*, 54 Ala. 471.

**891.** Where, however, the contract is within the delegated powers, one who has dealt with it in its corporate character, is in general estopped from setting up its want of complete organization, according to the provisions of its charter, to defeat the corporation in the enforcement of the contract he has made with it. *Ibid.*

**892.** The accommodation drawee of a bill of exchange, which was discounted by a bank, for the acceptor who procured it to raise money for his own use in that way—the drawer not being aware of this and not being present or participating in the negotiations—is not thereby estopped from denying the proper organization of the banking corporation, when sued by it on the bill. *Ibid.*

**893.** Under the provisions of the Revised Code (Part 2, Title 1, Chapter 1, §§ 1644, et. reg.) as amended by the Act of 1868, “supplementary to the corporation laws of Alabama,” a corporation is sufficiently organized to carry on the business of a bank of discount and deposit and loaning money, when the certificate of the associates (properly acknowledged and recorded) for the purpose of carrying on such banking business, shows the name selected by the associates; the town where its business is to be conducted; the amount of capital stock (within the limits prescribed) and the number of shares into which it is divided; the name and place of residence of the stockholders; the shares held by them respectively, and the time when the association is to begin and terminate. The association not claiming the right to issue or circulate its own notes, no deposits of money and transfer of stock to the auditor (under §§ 1644 and 1646 of the Revised Code) is necessary to authorize it to carry on other banking business. *Marion Savings Bank v. Dunkin*, 54 Ala. 471.

**894.** The dissolution of a partnership with an individual banker does not relieve the retiring partner from liability for subsequent deposits made, without notice of the dissolution, by one who had been before a depositor. *Howell v. Adams*, 68 N. Y. 314.

**895.** The liability of the retiring partner is not changed by the fact that the depositor did not know that he was a partner. *Ibid.*

**896.** So also, the alteration of a certificate of deposit in respect to the rate of interest, made after the dissolution of the partnership by



the partner continuing the business, but before notice to the holder, does not relieve the retiring partner; such holder having the right until notice, to treat the partnership as continuing, the alteration will be deemed to have been authorized. *Ibid.*

**897.** Proof of publication of notice of dissolution in newspapers, in the place where the bank was located, unconnected with any evidence that the depositor resided there, or took the papers, is but slight, if any, evidence of notice; and when he testifies that he never saw the notice or heard of the dissolution will not authorize a finding of notice. *Ibid.*

**898.** A bank is not liable upon a certificate of deposit until after demand of payment, and therefore, the statute of limitations does not begin to run against it until demand is made. *Ibid.*

**899.** Where a savings bank is bound by its rules to exercise its best care to prevent fraud, it is not protected by a clause in such rules that a payment to one producing a deposit book shall be deemed good and valid, in case of a payment made by it, merely upon the production of a depositor's book, to one who has wrongfully obtained possession of and produces it under circumstances such as would necessarily excite suspicion and inquiry; as where the person who presents the book is of a different sex from the depositor. In the absence of any rules assented to by its customers a savings bank is to be governed by the same legal principals which apply to other moneyed institutions. Where it has prescribed rules to which a depositor has assented, they are the agreement between them, and each must conform to them to preserve rights against each other. The by-laws of defendant's, a savings bank, which were printed in its customers' deposit book, contained the following: "The bank will use its best efforts to prevent fraud; but all payments made to persons producing the deposit books shall be deemed good and valid payments." It was also worded that drafts might be made personally, or by order in writing of the depositor if the bank have his signature on the signature book. Plaintiff was a depositor, and defendant had his signature in such book. The wife of plaintiff wrongfully obtained possession of his deposit book, which she presented with a forged check or order, for \$2,850, and this sum was paid her. In an action to recover the amount the order and the signature book were produced on the trial. Defendants' own officers, as witnesses, stated that there was a difference between the signature to the order, and that in the signature book. They declined to charge that the payment was valid, but left it to the jury to determine whether defendant used its best efforts to prevent fraud. *Held*, that as this court had not the benefit which the trial court had of the inspection of the signatures it could not say but that said court on inspection, discovered such a difference, as with the other circumstances of the case, authorized an inference of negligence and made a submission of the question to the jury proper. Also *held*, that a request to charge that if the defendant exercised ordinary care and diligence, and paid in good faith, it was excused, was properly refused, as defendant had obligated itself to exercise more than ordinary care, *i. e.*, its "best efforts." *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314.

**900.** A bank which has fraudulently permitted funds on deposit

belonging to a trust estate to be transferred to the individual account of the trustee, is properly chargeable with interest from time of such transfer. *Holden v. N. Y. and Erie Bank*, 72 N. Y. App. 286.

**901.** A national bank, the defendant, had in its house certain United States bonds belonging to plaintiff; its cashier in the spring of 1869, for a sufficient consideration, agreed to exchange the same for registered bonds. This the bank neglected to do, and November, 1869, the bonds were stolen. In an action to recover their value, *held*, that defendant was liable. *Yerkes v. Nat. Bank of Port Jervis*, 69 N. Y. 382.

**902.** Where half of bank note sent in payment, other half to follow, title to note remains in sender. The payment is conditional and inchoate, and therefore revocable. *Smith v. Munday*, C. vii. 22; 3 E. & E. 22. (Eng. Com. Law.)

### BILLS OF EXCHANGE.

**903.** A bill of exchange specially indorsed, "Pay J. C. or order on account of B. G. & S.," was indorsed generally by J. C., sent by him to his correspondents, and paid by the drawers. J. C. failed about an hour before this payment was made, in debt to his correspondents, and this failure was known about an hour after payment made. His correspondents applied the amount of the payment to reducing their claim against J. C. In an action by B. G. & S. against these correspondents to recover the amount of the payment,—*Held*, that the special indorsement showed that no consideration had been paid for the bill by J. C.; that it was notice to all subsequent holders that J. C. held the bill in trust for B., G. & S. for collection; that this trust followed the bill, and that neither J. C. nor his indorsee had any property in the bill. *Held*, further, that the defendants, not having paid the money over to J. C. before hearing of his failure, could not apply it to reducing the debt owed them by C. *Held*, further, that B., G. & S. were the real owners of the bill, and as such entitled to recover.

**904.** A general indorsement\* of bills is *prima facie* evidence of property in the indorsee: but notwithstanding a general indorsement, paper sent only for collection will still remain the property of the sender as to all persons having notice. *Blaine v. Bourne*, 11 R. I. 119; also *Bank of Metropolis v. New England Bank*, 6 How. U. S. 212; *Collins v. Martin*, 1 B. & P. 648; *Wilson v. Smith*, 3 How. U. S. 763, 769.

**905.** Acceptance of a bill of exchange in these words: "Accepted. Payable after my advances are paid," may be explained by parol evidence, so far as to show what advances were meant, even including future advances. A conditional acceptance of a bill of exchange makes a new contract between the payee and acceptor, which can be enforced only on averment and proof that the condition has been performed. *Shackelford v. Hooper*, 54 Miss. 716.

**906.** The intention to assign a fund in the hands of another, founded upon sufficient consideration and expressed by a bill of ex-



change, operates as an equitable assignment to the payee. A., living in this State, had a certain fund to his credit in the hands of B. in New York, and on July 30th, 1861, gave to C., for sufficient consideration, a bill of exchange upon B. for the whole amount of the fund; the bill of exchange was immediately indorsed by C. to D. (residing in New York) and mailed to his address, civil war between the States being then raging; the bill of exchange was never received by D. nor had he notice of it until 1866, when he was informed of the remittance by C., who had, however, then forgotten of whom he had purchased the bill; in 1865, the fund in the hands of B. was collected of him by A., in 1876, C. ascertained, by finding a memorandum upon an old check book, that the bill of exchange had been purchased from A.; D. thereupon, in 1876, made a demand upon A. for payment to him of the fund, which A. declined to pay, and D. thereupon instituted suit against A. for the same. *Held*, that D. was entitled to recover. In such case, even if it was negligence upon the part of C. to have forwarded the bill of exchange by mail, A. was contributory to it and cannot take advantage of it. The statute of limitations did not begin to run against D., in such case, until after the demand made by him upon A. in 1876 for the amount of the fund. *Kahnweiler v. Anderson*, 78 N. C. 133.

**907.** Although bills of exchange, drawn and accepted by the same parties, may be in strictness promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is clear, both the holders and the parties may treat them accordingly. A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, reëxchange, and other charges, when the bills are returned from the colonies dishonored, however valid in law, does not apply in the absence of an agreement, express or implied, to allow reëxchange. When the holders of bills drawn by P. L. & Co., in London, on P. L. & Co., in Australia, having no occasion to transfer money from *London to Australia*, sent them to the latter country, not for the purpose of employing the proceeds there, but of having them remitted to London, the dishonor of such bills does not entitle the holders to recover damages by way of reëxchange.

**908.** The right to "reëxchange," in the absence of express agreement, arises when the holder of a bill who has contracted for the transfer of funds from one country to another has sustained damages by its dishonor, through having to obtain funds in the country where the bill was payable. "Reëxchange" is the measure of those damages. *Wilans v. Ayers*, 41 Eng. Law Reports, 3 Appeal Cases, 148—1878.

**909.** H. drew and indorsed a bill of exchange on A. for the accommodation of the latter, who discounted it at a bank. *Held*, a *remitter* by the bank of a judgment on the bill against A., discharged H. from liability as drawer and indorser. *Case v. Hawkins*, 53 Miss. 702.

**910.** In an appeal by the indorser of a bill of exchange who had been condemned with the makers,—*Held*, that to hold the indorser, demand of payment ought to have been made on the third day of grace, with protest and notification, and that, even when the bill was made payable at the residence of the holder himself. *Knapp, et al. v. The Bank of Montreal*, 1 L. C. R. 253, Q. B. 1850; 2306 *et seq.* C. C.

**911.** Plaintiff chartered defendant's vessel for a voyage from Charleston to Liverpool or Havre, for a sum named; bills of lading were to be signed by the master but without prejudice to the charter. It was agreed that any difference between the bills of lading and the charter-party was to be settled at Charleston before the vessel sailed, in accordance with the rates of freight, weight, etc., expressed in the bills of lading, if in the charterer's favor, "by the captain's bill, payable ten days after arrival at the port of discharge." Plaintiff furnished a cargo of cotton consigned to Liverpool. By the custom at that port, which was well known to plaintiff and the master, freight is only collectible on net weight of cotton. Plaintiff calculated the freight upon the gross weight of the cotton covered by the bills of lading, and after the vessel was laden ready for sea he demanded of the master a bill of exchange for the difference; the latter objected on the ground that the tare should be allowed. Plaintiff was agent for the owners of the vessel and he alone could get clearance for her at the custom-house; he refused to clear and allow her to proceed unless the master would sign the bill and an agreement that the question in dispute should abide the decision of the "United States Court at Charleston" in a case then pending. The captain thereupon signed. In an action upon the bill so given, *held*, that the charter-party contemplated the bills of lading should be resorted to in the first instance as a means of payment to the shipowners, and plaintiff was entitled to credit for no more than they actually represented; *i. e.*, the amount collectible thereon; that in the absence of words of exclusion in the charter-party it should be held to have been framed in reference to the usage, which should, therefore, have been taken into consideration in estimating the amount due on the bills of lading; and that defendants were not concluded by the bill of exchange or the agreement: 1st, As the bill was not delivered in final settlement of the claim but under an agreement in effect, an arbitration, which the captain as agent for the owners had no authority to make; 2d, Because the unlawful refusal of plaintiff to allow the vessel to leave the port until the bill was signed constituted duress. *McPherson v. Cox*, 86 N. Y. 472.

**912.** It seems that it is not duress for a person to insist on his legal rights. *McPherson v. Cox*, 86 N. Y. 472.

**913.** Where a bill of exchange is made payable to and indorsed by "A. B., Agent" the word "Agent" is a mere *designatio personæ*, and, in an action against him as indorser, parol evidence is inadmissible to show that he was merely an agent, and that the plaintiff knew this fact. *Bartlett v. Hawley*, 120 Mass. 92.

**914.** The words "I take notice of the above," written and signed upon an unnegotiable bill of exchange by the drawer, do not of themselves necessarily impart an acceptance of it, and parol evidence of a refusal to accept by the drawee, at the time of its presentation, is admissible. *Cook v. Baldwin*, 120 Mass. 317.

**915.** A part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder. *Ibid.*

**916.** The fact that the name of an acceptor was written across the stamp before the bill was drawn does not reasonably raise an inference



that the bill was accepted for the accommodation of the drawer. *Harris v. Sterling*, 9 Ir. R., C. L. 198—Exch.

**917.** Evidence that the holder of a bill of exchange had notice, shortly before maturity, that it had been accepted for the accommodation of the drawer, is not evidence that he had such notice at the time of discounting the bill. *Ibid.*

**918.** An action upon a bill of exchange against the drawer thereof, the latter may defeat the action by showing that there was no consideration therefor, except where it has passed into the hands of a *bona fide* holder for value before maturity. *McCulloch v. Hoffman*, 17 N. Y. Sup. Ct. Reps. 133.

**919.** Where such defence is interposed the defendant may show all that occurred at the time of the making of the bill, not to limit its effect or change its character, but to establish the absence of any consideration and the knowledge of the plaintiff of that fact. *Ibid.*

**920.** The authority of an agent to receive payment by an acceptance of a bill drawn in blank, does not carry with it an authority to the agent to draw a bill payable to his own order. *Hogarth v. Wherley*, 32 L. T. N. S. 800; 10 L. R. C. P. 630; 44 L. J. C. 330.

**921.** When by the contract for sale and purchase of goods it is stipulated that payment should be made by the buyer's acceptances of the sellers' drafts, if before the time for delivery of the goods the purchaser becomes insolvent, or the acceptances are dishonored, the vendor still has a lien for unpaid purchase money. Difference in this respect between acceptances of the purchaser and those of a third person. *Gunn v. Bolckow, Vaughan & Co.*, 44 L. J. Chanc. 732; 10 L. R. Ch. 491; 32 L. T. N. S. 781.

**922.** A bill of exchange drawn in one State upon a party in another, the known and common purpose of both parties being to carry on a business declared unlawful by statute of the first State, is void as to the drawer in the hands of a party to the bill having notice of its true character. *Davidson v. Lanier*, 4 Wall. U. S. 447.

**923.** The matter of bills of exchange when drawn by officers of the government, examined; and the law decided to be, that as under existing laws there can be no lawful occasion for an officer to accept drafts on behalf of the government, such acceptances cannot bind it, though there may be occasions for drawing or paying drafts which may bind the government. *The Floyd Acceptance*, 7 Wallace, U. S. 666.

**924.** The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the check is presented; and if not so paid and he is notified, he becomes absolutely bound to pay the amount at the place named. *Hibernian Nat. Bank v. Lacombe*, 84 N. Y. 367.

**925.** The rights of the parties, therefore, are to be governed by the laws of the place of payment. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

**926.** The plaintiff, a national bank, organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused;

it was duly protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held*, that, under and within the meaning of the provision of the Code of Procedure (§ 427), providing that an action against a foreign corporation may be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen in this State," plaintiff was to be regarded as a non-resident; that the cause of action arose in this State; and that, therefore, the court had jurisdiction of the action. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

**927.** After the delivery of the draft to plaintiff, the M. & T. Bank was placed in liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets; they were made defendants, and claimed title to the attached property. *Held*, that neither the law nor the adjudication under which said commissioners were appointed could have any operation here to defeat or affect the lien of plaintiff's attachment. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

**928.** Where a bill of exchange is paid to one who holds it in good faith and for value, he cannot be called upon to account for the money paid, upon proof that in transactions between the drawer and drawee, of which he had no knowledge or means of knowledge, there has been some fraud or mistake to the injury of the drawee; and this, although the holder, not having parted with value at the time when he took the draft, could not have enforced it against the drawee, even after acceptance. *Southwick v. First Nat. Bank*, 84 N. Y. 420.

**929.** This rule is based upon principles of public policy. *Southwick v. First Nat. Bank*, 84 N. Y. 420.

**930.** In March, 1873, T. of the firm of S., T. & Co., doing business at Memphis, drew his draft upon that firm, payable to the order of J. N. M. & Son, a Boston firm. The draft was accepted by the drawees, payable at Memphis in forty days. The holder sent the draft to Memphis for collection. Before it fell due the drawees notified the payees that they would not be able to meet it, and requested permission to draw for the amount. Permission was granted by telegram to draw at sight to pay said draft. S., T. & Co., thereupon drew upon J. N. M. & Son a sight draft for the amount. This draft was discounted by defendant, and with the assent of the drawers the proceeds were placed to their credit, their account with defendant being at that time overdrawn to more than the amount. J. N. M. & Son accepted the new draft on presentation, and subsequently paid it. S., T. & Co. drew a check on defendant to pay the old draft which it refused to honor, and refused to pay said draft when presented. S., T. & Co. soon after became insolvent. In an action to recover the amount of the new draft it was not alleged nor was it proved, that a demand or offer to return the draft was first made, or that defendant had any knowledge of the telegram, or the purpose for which J. N. M. & Son authorized the drawing of the new draft. The court directed a verdict for plaintiff. *Held*, error; that neither a cause of action for a conversion of the draft, nor one to recover back moneys paid by mistake, was established. *Southwick v. First Nat. Bank*, 84 N. Y. 420.



**931.** The complaint alleged that defendant was notified of the purpose for which the new draft was authorized to be drawn; that it received it, agreeing to collect and apply the proceeds for that purpose, but that it refused so to do. *Held*, that the court erred in denying a motion for a non-suit, as plaintiff failed to prove the cause of action alleged in the complaint. *Southwick v. First Nat. Bank*, 84 N. Y. 420.

**932.** It seems, that had the complaint been sufficient, and had a proper demand been made, plaintiff would not have been entitled to recover. *Southwick v. First Nat. Bank*, 84 N. Y. 420.

**933.** There is no implied warranty or representation on the part of the vendor of a bill, valid in the hands of an indorsee, that it was drawn against funds, or that it was not accommodation paper. *People's Bank v. Bogart*, 81 N. Y. 101.

**934.** A vendor of a bill purchased by him from and known by him to have been drawn for the accommodation of the acceptor, and as a means of borrowing money by the latter, is not bound, in the absence of any inquiry on the part of the vendee, and where the means of information are open to the latter, to disclose at the time of the sale the circumstances under which the paper was made. *People's Bank v. Bogart*, 81 N. Y. 101. The rule of caveat emptor applies in such a case. *People's Bank v. Bogart*, 81 N. Y. 101.

**935.** D., S. & Co., a banking and commission firm, accepted drafts drawn upon the firm by B., a clerk in their employ, which were purchased by defendants, who were note-brokers. B. had no funds on deposit, and said firm was not indebted to him. Defendants knew that the drafts were not drawn against funds; but were issued by D. S. & Co., as a means of borrowing money. Plaintiff had no such knowledge. Defendants had been accustomed for several years to purchase similar acceptances and to sell them in the market. Plaintiff had purchased large amounts of them from defendants and other brokers. In pursuance of their custom defendants immediately after said purchase sent a written notice to plaintiff that they had for sale acceptances of D., S. & Co., stating the price paid and for what they would sell. Plaintiff purchased a portion of the paper. Defendant made no express representation of any kind as to the paper and no inquiry was made by plaintiff as to its origin, character or consideration. D., S. & Co., failed a few days after; up to the day of such failure that firm had enjoyed the highest financial credit and standing, and it did not appear that defendants had any knowledge or information that it was in embarrassed circumstances. *Held*, that an action to recover back the moneys paid for the acceptances on the ground of fraud, on the part of defendants, in concealing their knowledge of the origin and consideration of the paper was not maintainable. *People's Bank v. Bogart*, 81 N. Y. 101.

**936.** Prior equities of antecedent parties to negotiable paper, transferred in fraud of their rights, will prevail against an indorsee who has received the paper in nominal payment of a precedent debt, where there is no evidence of an intention to receive it in absolute discharge and satisfaction beyond that of accepting or receipting it in payment, or crediting it on account. *Phoenix Ins. Co. v. Church*, 81 N. Y. 218.

**937.** When a party authorized by another to draw different drafts

on him upon different consignments to be made, and this other made different consignments and drew different drafts, the party authorizing the drafts accepts them in advance, and is bound to set aside and hold enough money from the proceeds of the consignment to pay them, come in for payment when they may. If he settle an account and pay over his balance without doing so, it is at his own risk. *Milttenberger v. Cooke*, 18 Wall. U. S. 421.

**938.** If the holder of a bill of exchange locks it up for two years he makes it his own, and cannot have recourse to the person from whom he received it. *Rouleau v. Tourangeau*, 2 Rev. de Leg. 30, K. B. 1820.

**939.** Action on draft drawn in New York for goods sold and delivered there, and accepted in Montreal, the price charged being in United States currency. *Held*, that the draft was payable according to such currency. *Copcutt, et al. v. McMasters*, 7 L. C. J. 340; S. C. 1863.

**940.** *Seemble*, that in suit on a bill of exchange expressing value received, and drawn without the State by plaintiff, the holder, on defendant, who is acceptor, within this State, damages at ten per cent. are allowable, notwithstanding want of protest (Wagn. Stat. 215, 216, § 8). *Phillips v. Evans*, N. Y. 17.

**941.** G. drew upon W. requesting him to pay an amount named to himself or order. *Held*, that the instrument could be declared on either as a bill of exchange or promissory note. *Golding v. Waterhouse*, 3 New Brunswick, 313.

**942.** The indorser of a bill of exchange is in all cases entitled to notice whether the drawer have or have no effects in his hands, and on this ground the court non-suited the plaintiff and refused his motion for a new trial. *Griffin v. Phillips*, 2 Rev. de Leg., 30 K. B. 1821, 2298 and 2319, *et seq.* C. C.

**943.** Where a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis and verbally accepted by a member of the firm then present in Chicago the validity of such acceptance is to be determined by the law of Illinois. In Illinois a parol acceptance of a bill of exchange is valid and a parol promise to accept it is an acceptance thereof. Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where suit is brought. *Scudder v. Union Nat. Bank*, 1 Otto. 405.

**944.** Bill of exchange or draft headed "New England Agency of the Pennsylvania Fire Insurance Company," having the words "Foster and Cole, General Agents for the New England States" printed in the margin, and appearing on its face to be drawn upon said insurance company in payment of a claim against it, is the draft of the company, and not of Foster and Cole, although it is signed by them in their own names. *Chipman v. Foster*, 119 Mass. 189.

**945.** Where a bill of exchange was drawn for the sole accommodation of the payees, and accepted by the drawee for the same purpose, and owing to the insolvency of the payees, the acceptor was compelled to pay the bill, and brought an action against the drawers to recover



the amount paid; *Held*, that there was no implied obligation on the part of the drawers to reimburse the acceptor. *Barnet v. Young*, 29 Ohio, 7.

**946.** That the drawers and acceptor, as between themselves, in the absence of any undertaking to the contrary, were not co-securities for the payers, or liable to contribution. *Ibid*.

**947.** Holder cannot sue for original consideration when there has been a failure to stamp foreign bill and a delay of a year. *Pooley v. Brown*, C. iii. 565, 11 C. B. N. S. 565, (Eng. Com. Law.)

**948.** A bill of exchange must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and it should be for the payment of money only, and not for the performance of any act or in the alternative. An instrument drawn for the payment of six hundred dollars, as follows: "The hundred dollars out of the first estimate or when the first floor joists are in, two hundred dollars when the building is ready for the roof, and two hundred dollars when the stoops are completed, and charge the same to my account," is not a bill of exchange because payable upon a contingency, and out of a particular fund. Where the payment depends upon a contingency, the happening of the event will not change the character of the instrument. It was not a bill of exchange when made, and would not become such by matter *ex part facto*. *Miller v. Excelsior Stone Co.*, 1 Bradwell's Ill. App. Re'pts. 273.

**949.** An acceptor of a bill of exchange drawn by the purchaser of machinery, cannot by paying the bill before maturity, change the relations of the original parties to it and to each other, and thus cut off the drawer from the defence of failure of consideration, from defects in the machinery so purchased. The acceptor paying before maturity is not a holder for value of the paper, as against the drawer. The liability of the acceptor is to pay according to the terms of the contract. His remedy, as against the drawer, then is for money had and received by him, of which the bill is the evidence. An acceptor, even though he may have been surety for the drawer to the payee for machinery purchased by the drawer, in paying before maturity is subject to any defence which could be made by the maker, if sued by the payee. *Stark v. Alford*, 49 Texas, 260.

**950.** The possession of the draft by G., the plaintiff's assignee, was presumptive evidence of his ownership; and this presumption was not rebutted by the evidence on the trial. G. was one of the firm of R., B. & Co., upon whose claim the draft was given, and was therefore part owner of the draft when it was given. The paper is produced in court by the assignee of G., and this *prima facie* establishes the plaintiff's title. *Kidder, Assignee v. Norrobin, et. al.*, 72 N. Y. App. 159.

**951.** In the absence of any express or implied agreement, a party is not compelled to pay a draft drawn on him merely because he has been in the habit of paying similar drafts. *Helm v. Meyer, Weis & Co.*, 30 La. 943.

**952.** Where there is no value or consideration for acceptance it is a good defence in action by drawer or person taking under him. *Van-uelin v. Bonard*, C. ix. 341, C.; 15 C. B. N. S. 341, C. (Eng. Com. Law.)

**953.** Where a draft is drawn in favor of the payee on a certain

fund to arise from the sale of property then in the drawee's hands, and the payment of the draft, by its own terms, is postponed to the payment (out of the same fund), of a debt due the drawee, the drawee who has not accepted the draft, is only liable for whatever balance of the fund may remain, after the payment of his own debt. *E. Marqueze & Co. v. Fernandez & Co.*, 30 La. 195.

**954.** A., of St. Louis, being indebted to B., of St. Joseph, requested B. to draw upon him, upon which draft he would raise the money and remit the proceeds to B. on account of his indebtedness. B. accordingly drew a draft to the order of C., his banker at St. Joseph, upon which C. indorsed "Pay to the order of C." his banker at St. Joseph, upon which C. indorsed, "Pay to D. or order, for collection for my account." Upon receipt of the draft at St. Louis, A. accepted it, and offered it for discount to plaintiff. By consent of A. and plaintiff, the indorsement was stricken off, and plaintiff then discounted the draft, and A. received and remitted the amount to B. In an action on the draft against B., the drawer, *held*, (1) that plaintiff could not, by parol evidence, show a contract between A. and B. by which the latter was to have the draft discounted on the faith of his name as drawer; (2) that the indorsement, being restrictive, destroyed the negotiability of the draft and operated as a mere power of attorney to the banker at St. Louis to receive the proceeds of the draft for the use of the drawer; (3) that the erasure of the indorsement, without the knowledge or assent of B., destroyed the validity of the draft as to him, and plaintiff, having knowledge of the alteration, was bound to know that such was its effect when he took the draft. *Mechanics' Bank v. Valley Packing Co.*, 4 Mo. Ct. Appeals (St. Louis,) 200.

**955.** When a bill drawn and indorsed in England payable abroad is dishonored by acceptor's non-payment, the holder can recover from indorser the amount of reëxchange and no more. A custom that he is entitled to recover either the reëxchange or the amount he paid for the bill is invalid. *Suse v. Pompe*, xcvi. 538; 8 C. B. N. S. 538. (Eng. Com. Law.)

**956.** A promise to accept a future bill of exchange, in consideration of money to be advanced thereon by the promisee, is invalid, and an action thereon cannot be maintained against the promisor. *Flato v. Mulhall, et al.*, 4 Mo. Ct. Appeals (St. Louis) 476.

**957.** Where an accommodation bill is accepted at the request of a third party, who agrees to share any loss, such third party is not discharged by time given acceptor and drawer. *Way v. Hearn*, ciii. 774; 11 C. B. N. S. 774. (Eng. Com. Law.)

**958.** Acceptor who tears the bill in two parts, with the intention of destroying it, is liable to the *bona fide* holder obtaining it from the drawer, who fraudulently joined the pieces in such a way as to look as if the halves had been transmitted by mail. *Ingham v. Primrose*, xcvi. 82; 7 C. B. N. S. 82. (Eng. Com. Law.)

**959.** One H. having entered into a contract with defendant and being indebted to plaintiff gave to latter a written order directed to defendant, requesting him to pay plaintiff \$400 on account "as per contract"; defendant verbally accepted the order and thereupon plaintiff released certain security that he had. In an action thereon, *held*, that the instrument was not a bill of exchange, but a mere appropria-



tion of so much of the contract price to become due H. and only payable out of that fund, which appropriation became irrevocable when assented to by defendant, and he was liable to pay over the amount from the sums, if any, which should become due H. on the contract. *Ehrichs v. DeMill*, 75 N. Y. 370.

**960.** The "refusal" spoken of in the provision of the statute in reference to bills of exchange (1 R. S., 769, § 11), which declares that one upon whom a bill is drawn and delivered for acceptance, who destroys or refuses to deliver it, shall be deemed to have accepted it, is an affirmative act, or is made up of conduct tantamount to one; it is also a willful or wrongful act. *Matteson v. Moulton*, 79 N. Y. 627.

**961.** The mere retention, without a demand for a return, or a dissent to the retention, and with the permission of the owner, is not a refusal within the meaning of the statute. *Matteson v. Moulton*, 79 N. Y. 627.

**962.** Where, therefore, it appeared that the drawee promised to pay the amount by the time or upon a contingency named, and that the payee, relying upon this, permitted the bill to remain in the hands of the former, and no demand or request for its return, and a denial or evasion thereof was proved, *held*, that the drawee was not chargeable as acceptor of the bill. *Matteson v. Moulton*, 79 N. Y. 627.

**963.** Also, *held*, that the promise to pay was void under the statute of frauds (2 R. S., 135, § 2), as it was an oral promise to answer for the debt of another. *Matteson v. Moulton*, 79 N. Y. 627.

**964.** A draft drawn for the price of goods sold and delivered is equivalent to a demand of payment, and, there being no proof of credit, and the bill having been received without objection, equally brings the case within the statute of, which gives interest on money due and "withheld by unreasonable and vexatious delay." *Whiteside v. Hyman*, 17 N. Y. Sup. Ct. 218.

**965.** The acceptance of a draft dated in one State and drawn by a resident of such State on the resident of another, and by the latter accepted without funds and purely for the accommodation of the former, and then returned to him to be negotiated in the State where he resides, and the proceeds to be used in his business there—he to provide for its payment—is, after it has been negotiated and in the hands of a *bona fide* holder for value and without notice of equities, to be regarded as a contract made in the State where the draft is dated and drawn, even though by the terms of the acceptance the draft is payable in the State where the acceptors reside. *Tilden v. Blair*, 21 Wall. U. S. 241.

**966.** It is accordingly to be governed by the law of the former State; and if by the law of that State the holder of it, who had purchased it in a course of business without notice of equities, is entitled to recover the sum he paid for it, though he bought it usuriously, he may recover such sum, though by the law of the State where the draft was accepted and made payable, and where usury made a contract wholly void, he could not. *Ibid*.

**967.** If, however, the parties calculate interest and make a settlement upon the basis of the old rate, and the debtor gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bankrupt Act and of any statute making such securities, void *in toto* as usurious, valid securities for the amount

which would be due on a calculation properly made. They are bad only for the excess above proper interests. *Burnhisel v. Firman*, 22 Wall. U. S. 170.

**968.** An indorser of a promissory note, even though it be an accommodation note, is not one; but is a principal debtor, if the note be not paid and proper steps have been taken to fix his liability. *Ross v. Jones*, 22 Wallace, U. S. 576.

**969.** Under the Act of Congress of Feb. 10, 1868, and the Act of the Legislature of Pennsylvania, of March 31, 1870, shares in national bonds may be valued for taxation for county, school, municipal and local purposes, at an amount above their par value. *Hepburn v. The School Directors*, 23 Wall. U. S. 481.

### BILLS OF LADING.

**970.** The clause in a bill of lading which acknowledges the receipt of property, or declares as to its condition, may be disproved by parol proof. The holder of a bill of lading can acquire no greater rights under it than were possessed by the original consignee. *Hunt & Macaulay v. Mississippi Central R. R. Co.*, 29 La. 446.

**971.** Bills of lading bound the carriers to forward the goods to their destination with the usual dispatch. To show usual time of transit, the shippers called a witness who testified thereto, but said he derived his information from a clerk in the freight office at the place of destination. *Held*, that fact being peculiarly within the knowledge of the carriers, that slight evidence thereof on the part of the shippers was sufficient, and that the testimony was competent. *Newell, et al. v. Smith, et al.*, 49 Rowell, Vt. 255.

**972.** Bills of lading imparted on its face as an absolute undertaking. On the book thereof were printed rules and regulations that modified such undertaking, but it did not appear that the shippers had knowledge thereof. *Held*, that evidence modifying such undertaking should come from the party apparently bound thereby. *Newell, et al. v. Smith, et al.*, 49 Rowell, Vt. 255.

**973.** In an action by plaintiffs, as assignees of common carriers of the freight on a cargo of staves shipped by defendants from T. to N. Y., plaintiffs, for the expressed purpose of proving ownership of the cause of action, offered in evidence the bill of lading, executed about six years before the trial, indorsed by the carrier to a bank as security for plaintiffs' acceptance and payment of an accompanying draft; also with an indorsement thereon, signed by the bank and directed to plaintiffs, as follows: "Upon your acceptance of the draft the bill of lading is placed in your custody to collect and apply the first proceeds in payment of the draft." This evidence was rejected. Plaintiffs also offered to prove by parol an acceptance which was rejected. *Held*, error; that the presumption from the possession of the draft was that plaintiffs had complied with the condition precedent, *i. e.*, the acceptance of the draft; that, although plaintiffs could not be charged as acceptors without showing a written acceptance, yet, as defendants were not parties to the draft, or privies, and the fact of acceptance was collateral to the



issues herein, it might be proved by parol. *Sprague v. Hosmer*, 82 N. Y. 466.

**974.** Bill of lading for goods sent to a purchaser, and not objected to by him, amounts to a liquidation of an account within the statute of giving interest on liquidating accounts between the parties, and ascertaining the balance; there being no other transaction between the parties. *Cooper & Co. v. Coates & Co.*, 21 Wall. U. S. 105.

**975.** Bills of lading for goods not actually put on board, cannot be signed by the master of a ship under his authority as agent, and therefore the owner of the ship is not responsible to parties taking, or dealing with, or making advances on the faith of such an instrument which is untruthful in this particular. The consignee and every other party thus acting does so *with notice* of this limitation of the power of the master, and acts at his own risk both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped. Bills of lading are not negotiable in the same sense in which bills of exchange or promissory notes are. They stand in the place of the goods they represent, and delivery or indorsement of them transfers the right of property in the goods, but not in the contract itself, so as to enable the indorsee to maintain at the common law an action on it in his own name. A railroad is not liable for advances made by a commission merchant upon the faith of a bill of lading fraudulently signed by one of its station agents, the goods specified never having been shipped or received at the depot for transportation. *Balto. & Ohio R. R. Co. v. Wilkens*, 44 Md. 11.

**976.** Where one of two innocent parties must suffer from the wrongful or tortuous acts of a third party, the law casts the burden or loss upon him by whose act, omission or negligence such third party was enabled to commit the wrong which occasions the loss. Where the agent of a railroad corporation, engaged as a common carrier, has authority to receive grain for shipment over its road, and issue in the name of the corporation a bill of lading for the consignment, and promise in the bill of lading to deny that it has received the grain mentioned therein, and is liable to the indorsee and assignee for advances made in good faith on the bill of lading. *Wichita Savings Bank v. Atchison, Topeka and Santa Fe R. R. Co.*, 20 Kansas, 519.

**977.** Bills of lading are transferable by indorsement. *Robertson v. Stuart*, 68 Me. 61.

**978.** The bill delivered to the shipper of the goods is the bill that makes the contract concerning them, and if it is different from the one retained by the ship, it and the "Ship's bill" is evidence of the contract. *The Thames*, 14 Wall. U. S. 98.

**979.** It seems that plaintiff, on discount of Q.'s draft, had the security for repayment derived from three different sources; *i. e.*, the responsibility of Q., defendants' guaranty, and the special property, secured to them by the bill of lading; the failure to realize on either left the others open to them. *Commercial Bank v. Pfeiffer*, 108 N. Y. 242.

**980.** The discount of a draft drawn by a consignor upon his consignee, accompanied by delivery of a bill of lading to the party making the advance passes to him not only the legal title, but in the eye of the law is regarded as an actual delivery and change of possession of the property. *Ibid.*

**981.** A consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bill should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. *Held*, that there was no recourse by the consignee against the bank. *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. U. S. 181.

**982.** S. and D., correspondents and agents at Buffalo of B. of New York, to fill an order from B., purchased in their own name a boat load of wheat, which was delivered on board a canal boat. S. and D. were not furnished by B. with money or credit wherewith to make the purchase; but in accordance with their understanding and course of business they raised the funds by procuring plaintiff to discount a draft drawn by them on B. on delivery, as collateral, of a bill of lading of the wheat, wherein it stated that the wheat was shipped to New York to account and order of plaintiff. Plaintiff, upon acceptance of the draft, delivered the bill of lading to B., with an indorsement thereon, to the effect that the wheat was pledged to it for the payment of the draft, and was placed in B.'s custody, "in trust for that purpose," and not to be diverted to any other purpose until the draft was paid. The wheat, on arrival, was delivered by the carrier on the order of B. to defendants, who were warehousemen, in store. B. sold the wheat to A., to whom defendants made advances thereon to pay therefor and subsequently delivered the wheat to him on B.'s order. Before such advances and delivery defendants had seen a copy of the bill of lading and of the indorsement thereon. In an action for a conversion of the wheat, *held*, that such a delivery of the bill of lading did not vest in B. a title to the wheat or confer upon him authority to sell, but simply vested him with the possession to hold in trust for plaintiff; that plaintiff's title could not be divested by any act of B., until payment of his acceptance; therefore that defendants were liable. *F. & M. Nat. Bank v. Hazeltine*, 78 N. Y. 104.

**983.** The *prima facie* legal effect of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it in him. *The Sally Magee*, 3 Wall. U. S. 451.

**984.** The indorsee of a bill of lading may libel a vessel for non-delivery of the goods shipped, though he be but an agent or trustee of the goods for others. *The Thames*, also *The Vaughan v. Telegraph*, 14 Wall. U. S. 258.

**985.** A "clean" bill of lading, that is to say a bill of lading which is silent as to the place of stowage, imparts a contract that the goods are to be stowed *under deck*. *The Delaware*, 14 Wall. U. S. 579.

**986.** This being so, parol evidence of an agreement that they were to be stowed on deck, is inadmissible. *Ibid*.

**987.** Bill of lading may be explained by parol evidence in so far as it is a receipt as distinguished from a contract. *The Franklin*, 9 Wall. U. S. 325.



## BILLS OF SALE.

**988.** An absolute bill of sale, executed to secure a debt, operates as a mortgage, and will be postponed to a subsequent and recorded mortgage. *Rogers v. Vaughan*, 31 Ark. 62.

**989.** A bill of sale of personal property was made at nine o'clock in the evening. The property was twenty-three miles distant. Possession was delivered at four o'clock in the morning of the next day, and the vendee remained in possession until the property was seized in the afternoon of that day, on attachment at the suit of a creditor of the vendor. *Held*, that this was an immediate delivery of possession, with continued change of possession, under the statute of Montana, making sales of personal property, "unless accompanied by immediate delivery and followed by actual and continued change of possession," "conclusive evidence of fraud against creditors." *Kleinschmidt v. McAndrews*, 117 U. S. 282.

## BONA FIDE HOLDER.

**990.** Plaintiffs contracted to sell to A. a quantity of corn to be paid for in cash on delivery. At the request of A. plaintiffs caused a portion of the corn to be loaded on board a vessel, for their account, and received the weigher's return, which they indorsed and delivered to A., to enable him to procure bills of lading in his own name and to sell his exchange drawn against the same, it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A. procured the bills of lading, which he transferred to defendants as security for three bills of exchange drawn against the corn, forming part of a parcel of exchange sold to defendants by A. Defendants paid to A. a portion of the proceeds of the exchange so purchased, and forwarded the three bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded the same or the bills of lading, or that defendants should agree to account to them for the proceeds; defendants refused. At that time they had in their hands of the purchase-price of the exchange more than the value of the corn. In an action for the conversion of the corn, the defence was that defendants bought and paid for the corn in good faith without notice; *held*, that no title to the corn passed from plaintiffs to A.; that the condition precedent of payment was not waived by the symbolical delivery; that as defendants, at the time of plaintiffs' demand, had sufficient means in their hands to protect both themselves and plaintiffs from loss, their refusal to comply was without justification; that they were to be regarded as holding the proceeds in place of the property, and were liable to pay it over to plaintiffs as the rightful owners; and that, by payment of a portion of the purchase-money before notice of plaintiffs' claim, defendants were entitled to protection as *bona fide* purchasers, only to the extent of such payment. *Dows v. Kidder*, 84 N. Y. 121.

**991.** There can be no *bona fide* holder of town bonds, within the meaning of the law, applicable to negotiable paper, as they can only be issued by virtue of special authority, conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute. *Cagwin v. Town of Hancock*, 84 N. Y. 532.

**992.** All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, must see to it that its provisions were complied with; and, in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith does not preclude the town from showing that they were illegally issued. *Cagwin v. Town of Hancock*, 84 N. Y. 532.

**993.** The liability of the town is not taken away by the fact that the legislator has directed a special mode in which the money to pay the principal and interest of a bond is to be raised; the directions being given to the town and county authorities and not to the holders of the bonds or coupons. *Town of Queensbury v. Culver*, 19 Wall. U. S. 83.

**994.** The right of stoppage in transitu is defeated by the indorsement and delivery by the vendee of a bill of lading of the goods to a *bona fide* indorsee for a valuable consideration without notice of facts on which such right would otherwise exist. *Becker v. Hallgarten*, 86 N. Y. 167.

**995.** An indorsee of a promissory note, taking it as collateral security for an antecedent debt without other consideration, but in good faith and before maturity, occupies the position of a holder for value and is protected as such. *Cont'l Nat. Bank v. Townsend*, 87 N. Y. 8.

**996.** A satisfaction-piece of a mortgage is a conveyance within the meaning of the Recording Act, and one who advances money to be secured by bond and mortgage upon the faith of a satisfaction-piece of a prior mortgage upon the premises is a "*bona fide* purchaser" within the provisions of said act. (1 R. S., 752, §§ 37, 38.) *Bacon v. Van Schoonhoven*, 87 N. Y. 446.

**997.** Purchase of judgment for less than its face does not establish that the purchase was not made in good faith. See *Harmon v. Hope*, 87 N. Y. 10.

**998.** Where an assignee of a bond and mortgage purchased in good faith and for value, in reliance upon a certificate made by the mortgagor at the time of the execution of the instruments, to the effect that the mortgage was a valid lien, and would be such in the hands of an assignee to the full amount of principal and interest, and that he had no defence to the mortgage or bond in law or equity. *Held*, that the mortgagor was estopped from setting up, in an action to foreclose the mortgage, the defence of usury; that it was immaterial that the mortgagor had not the plaintiff in his mind at the time of signing the certificate, as it was to be taken as if directed to whom it might concern; also that the certificate was not deprived of its force, because executed at the same time with the mortgage, it was not to be considered as part of that instrument. *Weyh v. Boylan*, 85 N. Y. 394.

**999.** Also *held*, that the fact that plaintiff was a second assignee, and that the first assignees had knowledge of the facts, and so could



not avail themselves of the estopped, did not prevent him from so doing. *Weyh v. Boylan*, 85 N. Y. 394.

**1000.** The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties. *Stephens v. Bd. Edn. of Brooklyn*, 79 N. Y. 183.

**1001.** The doctrine, that an antecedent debt is not such a consideration as will cut off the equities of third parties, in respect to negotiable securities obtained by fraud, has no application to money so obtained. *Stephens v. Bd. Edn. of Brooklyn*, 79 N. Y. 183.

**1002.** It seems, that while the money remained on deposit in the bank, plaintiff could have compelled the bank to restore it, but having paid it out, without notice of any defect in the title of G., it was thereafter protected. *Stephens v. Bd. Edn. of Brooklyn*, 79 N. Y. 183.

**1003.** The doctrine that the *bona fide* holder for value of negotiable paper, transferred as security for an antecedent debt merely, and without other circumstances, is unaffected by equities on defences between prior parties of which he had no notice, does not apply to instruments conveying real or personal property as security, in consideration only of preëxisting indebtedness. *People's Savings Bank v. Bates*, 120 U. S. 556.

## BONDS.

**1004.** If a negotiable city bond be stolen, and its number be altered by the thief, it will be good in the hands of a subsequent *bona fide* holder who takes it for value. *Elizabeth City v. Force, et al.*, 29 N. J. 587.

**1005.** In debt on a writing obligatory, as follows: "Know all men by these presents that we, William J. Clark, of the city of Providence, R. I., as principal, and A. E. Burnside, Eben A. Kelly, and John Gorham, as sureties, are held and firmly bound unto the President, Directors and Company of the Commercial National Bank of the city of Providence, R. I., in the sum of ten thousand dollars; that is to say, the said William J. Clark in the whole of said sum above named, and the said A. E. Burnside, Eben A. Kelly, and John Gorham, each as surety respectively in the sum of thirty-three hundred and thirty-three and 33-100 dollars, to be paid to them, the said Commercial National Bank, their attorney, successors, or assigns, for which payment well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators firmly by these presents." *Held*, that the obligation was several; Clark being bound in one whole sum of \$10,000, and Burnside, Kelly, and Gorham, being each bound in one sum of \$3,333 1-3. *Commercial National Bank v. Gorham*, 11 R. I. 162.

**1006.** *Held*, that if the secretary was entrusted with the funds of the company, notwithstanding it was also the prescribed duty of the president to receive the money paid to the company and to deposit the same, and he was responsible for any failure of duty on his part, that did not relieve the secretary from responsibility for the faithful dis-

position of any funds confided to his care. That the unauthorized act of the president in entrusting funds to the secretary could not discharge the secretary from the faithful preservation thereof. That the stipulation of the bond was an undertaking for the fidelity and honesty of the secretary commensurate with the scope of his duties, and the enumeration in the 4th article of the by-laws of certain things to be performed by him, did not supersede this obligation which pervaded every department of his official functions. That the company had the right under this stipulation to insist upon indemnity for any deviation from the line of his duty to its prejudice. That in the absence of any provision to the contrary, such is the necessary import of the terms of the contract, and the sureties in executing the bond must be held as stipulating to this effect. Whilst it is an undoubted proposition, that the liability of the surety is not to be extended by implication beyond the terms of his written contract, by which his responsibility is to be measured, the bond constituting such contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other. *Engler v. People's Fire Ins. Co.*, 46 Md. 322.

**1007.** A municipal corporation cannot, without legislative authority, issue bonds in aid of an extraneous object. Every person dealing in them must, at his peril, take notice of the existence and terms of the law which, it is claimed, conferred the power to issue them, no matter under what circumstances he may obtain them. *Town of South Ottawa v. Perkins*, 94 U. S. 260.

**1008.** In a suit by a *bona fide* holder against a municipal corporation to recover the amount of coupons annexed to bonds issued by it, under authority conferred by law, questions of form merely, or irregularity, or fraud, or misconduct on the part of its agents, cannot be considered. *Town of East Lincoln v. Davenport*, 94 U. S. 801.

**1009.** When there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them. *Township of East Oakland v. Skinner*, 94 U. S. 255.

**1010.** Every dealer in municipal bonds, which upon their face, refer to the statute under which they were issued, is bound to take notice of all its requirements. Where upon their face, the coupons refer to the bonds to which they were attached, and purport to be the semiannual interest accruing thereon, the purchaser of them is charged with notice of all which the bonds contain. *Cromwell v. County of Sac*, 96 U. S. 51.

**1011.** Defendant borrowed, July 5th, 1875, of the New Amsterdam Savings Bank, the sum of \$5,000, for which he executed his bond and mortgage. On the 20th day of September, 1876, the bank became insolvent and passed into the hands of the plaintiff as receiver. At that time there was due and owing defendant, as a depositor of the bank, the sum of \$1,748.01. Held, that defendant was entitled to a set-off for the amount of his deposit. *Receiver of New Amsterdam Savings Bank v. Tarter*, 54 Howard, N. Y. 385.

**1012.** Under the provisions of the act of the Legislature authorizing an exchange of State bonds with certain railroad companies, the State was to occupy two relations to those who bought its bonds from the company. The first was that of a debtor to the holder, and the sec-



ond was that of a trustee holding the bond of the company and the lien created by the act to secure payment of the party who advanced money to the company. The Legislature had no authority to create the first relation. It did have power to enact the second. *Holland v. T. State of Florida, et al.*, 15 Fla. 455.

**1013.** Bond under seal, though voluntary, creates a debt, and is impeachable only for fraud. Such a bond is enforceable against the grantor and all claiming under the grantor as volunteers. *Garden, Exr'x v. Derrickson, et al.*, 2 Del. 386.

**1014.** On an indictment for receiving "three bonds of the United States, each of the value of ten thousand dollars, of the property" of one S., it appeared that the bonds were, after they were stolen, and before they were received by the defendant, fraudulently altered by erasing the name of S. and inserting the name of C.; the verdict was "guilty of receiving two bonds." *Held*, that the fraudulent alteration did not take away from them the character of bonds of the United States or deprive S. of his ownership in them. *Commonwealth v. White*, 123 Mass. 430.

**1015.** Where a party has given a bond to another to secure the faithful performance of the contract of a third person, it is the duty of the obligee to give reasonable notice to the guarantor of any defalcation on the part of the contractor. It is the prerogative of the court to define the character of the notice, and the duty of the jury to determine whether such reasonable notice has been given. *Roberts, et. al. v. Woven Wire Mattress Co.*, 46 Md. 374.

**1016.** Where a guaranty is subsequent to the contract between the principal and the guarantee, and forms no part of the consideration thereof, it requires a distinct consideration to give it efficacy as a collateral undertaking. But where a guaranty expressly referred to a previous agreement between the principal and the guarantee, which was executory in its character, and embraced prospective dealings between the parties; then the guaranty purports upon its face, and by necessary construction, a sufficient consideration. *Roberts, et. al. v. Woven Wire Mattress Co.*, 46 Md. 374.

**1017.** Where a contract of guaranty was signed by the guarantor, and delivered to the agent of the guarantee, and was in the possession of the guarantee at the time of a suit upon the contract, and was produced by him; there is sufficient *prima facie* evidence of the delivery and acceptance of the contract of guaranty, and other notice of its acceptance is unnecessary, unless there had been a stipulation to that effect. *Ibid.*

**1018.** Where a guarantor warranted the faithful performance by his principal of certain duties stipulated in a contract, among which was the duty of making returns of sales; the failure by the guarantee to notify the guarantor of his principal's default, and permitting the principal to make returns in a manner different from the stipulated mode, cannot afford sufficient evidence of the abandonment of the contract and the substitution of another. *Ibid.*

**1019.** Generally the term "bond" implies an instrument under seal. The official bond required of a collector of taxes must be a sealed instrument. The words "witness our hands and seals," when no seal is attached, will not make the instrument, though otherwise in

proper form, a bond. An instrument, in form a bond, but containing no seal, voluntarily executed and delivered in lieu of a bond and accepted therefor is valid. Its acceptance is a sufficient consideration to cover all official delinquencies in not paying over money actually collected after such acceptance. *Boothbay v. Giles*, 68 Me. 160.

**1020.** A married woman cannot bind herself as surety on an official bond. *Hynes v. Dickinson*, 32 Ark. 776.

**1021.** A money bond, issued by a body politic, under authority of law, payable to bearer, has the negotiable quality of ordinary commercial paper, and if, while it is a valid instrument, it reaches the hands of an innocent holder for value before maturity, although he derives his title from a thief, he will be entitled to recover the money due on it. The alteration of the number of a bond, where different bonds of the same series are distinguished alone by the numbers, will render the instrument void in the hands of the person who made the alteration, and also in the hands of those who claim under him. While the alteration of a stolen bond by a thief will avoid it as to him and those who claim under him, it will not impair the rights of the true owner. *Force v. Elizabeth*, 28 N. J. Eq. 403.

**1022.** A power to issue county bonds carries with it a power to make them payable out of the State where the county is, and to sell them also out of the State. *Synde v. The County*, 16 Wall. U. S. 6.

**1023.** A paper which in the body of it says "as witness my hand and seal" has the word "seal" affixed to the signature of the maker. It is a sealed instrument within the meaning of the statute. Code of 1849, ch. 143, § 2, p. 580. *Lewis ex'ors v. Overly's adm'r*, 28 Grattan (Va.) 627.

**1024.** A person taking a bond for the future good conduct of an agent already in his employment, must communicate to a surety his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding. The mere non-communication of such knowledge, irrespective of motive or design, is a fraud in law, which will invalidate the obligation. *Sooy Ads. State of N. J.*, 39 N. J. 135.

**1025.** A bond of indemnity given to an accommodation indorser conditioned upon the payment of certain notes or a single renewal of them, does not cover subsequent renewals. In such case, where the notes were renewed twice to it, by an agreement between them to that effect, is postponed to the lien of a mortgage upon real estate bound by the judgment, given by the defendants in the judgment before the second renewal of one of the notes and on the day of the second renewal of the other. *Appeal of First Nat. Bank*, 82 Penn. St. 488.

**1026.** There can be no innocent holder of paper issued by a municipal corporation without power. *Lindsey v. Rottaken*, 32 Ark. 619.

**1027.** Municipal bonds issued without authority, although negotiable in form, are void in the hands of an innocent holder. *Hancock v. Chicot Co.*, 32 Ark. 575.

**1028.** Bonds with coupons, payable to bearer, are negotiable securities and pass by delivery; and in fact have all the qualities and incidents of commercial paper. *Thomson v. Lee*, 3 Wall. U. S. 327.

**1029.** A bond executed by an attorney in fact who through what is shown to have been an accident causes the bond to be prepared and



signs it with the obligor's right family name, but with a wrong baptismal name is valid. *Dalton v. Cass*, 14 Wall. U. S. 472.

**1030.** The designation of a bank as the place of payment of a bond, imports a stipulation that its holder will have it at the bank when due to receive payment, and that the obligor will produce the funds to pay it. *Ward v. Smith*, 7 Wall. 447.

**1031.** If the obligor is at the bank, at the maturity of the bond, with the necessary funds to pay it, he so satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. *Ibid.*

**1032.** The sureties upon an official bond are not liable for a defalcation of their principal, occurring during a term preceding that for which the bond was given; nor are they made liable because their principal had during the term for which the bond was given, property out of which he might have provided funds to make good the defalcation. *Bissell v. Saxton*, 77 N. Y. 191.

**1033.** Where an officer elected for a second term has in his hands at the beginning of, and after he gives a bond for that term, public moneys which came into his hands during his first term, his failure thereafter to pay and account therefor is a breach of the condition of the bond and the sureties are liable. *Bd. Ed. v. Fonda*, 77 N. Y. 350.

**1034.** The representations, made at the time of execution, to a surety by the principal and a co-obligee on a bond, as to its scope and purpose, cannot limit or qualify the express language of the bond. *Appeal of Lane, et al.*, 112 Penn. 499.

**1035.** Defendant claimed that there was a fraudulent suppression and concealment by the persons who solicited him to sign as to the true condition of the bank. It appeared that defendant was informed, when he executed the bond, that it was to be used to give credit to the bank with the banking department, and with the public, so that it would be enabled to continue its business. *Held*, that this was a sufficient notice that the bank was in a precarious condition, and that under the circumstances, the fact that its exact condition was not disclosed was no defence; also, that as defendant had allowed the bond to be treated as an asset for three years, and the public to deal with it on that assumption until it became insolvent, he was estopped from setting up such defence. *Hurd v. Kelly*, 78 N. Y. 588.

**1036.** An offer to prove that the bond was delivered upon the consideration that certain other persons should execute it, who did not, was overruled. *Held*, no error; as this defence was not alleged in the answer; also, that as it appeared that whatever was said upon this subject, was prior to the time the bond was executed, and as the bond itself was complete and perfect, the whole sum proposed to be guaranteed by its being covered by the several sums assumed by the obligors who executed it, it was to be inferred that if it was originally contemplated that others should execute it, that purpose was abandoned. *Hurd v. Kelly*, 78 N. Y. 588.

**1037.** A bond regular on its face cannot be avoided even by sureties (the obligee not having had knowledge thereof) by the fact that they signed it on a condition that other persons were to execute it who did not execute it. *Dair v. United States*, 16 Wall. U. S. 1.

**1038.** A municipal bond in the ordinary form is a promissory

note negotiable by the law merchant within the meaning of the term in the act of March 3d, 1875. *New Providence v. Halsey*, 117 U. S. 336.

**1039.** It is within the discretion of a Circuit Court to take an appeal bond in which each surety is severally bound for only a specified part of the obligation. *N. G. In. Co. v. Albro*, 112 U. S. 506.

### BROKERS.

**1040.** When a real estate broker undertakes to furnish a purchaser, he is bound to act in good faith in presenting a person as such, and when one is presented the employer is not bound to accept him, or pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed. If the principal accepts the person presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned. *Coleman's Ex'r v. Meade & Co.*, 13 Bush, Ky. 358.

### BURDEN OF PROOF.

**1041.** It seems, that when the title of a purchaser of property is assailed as void under the statute (2 R. S. 137, §§ 1-5), because made to hinder, delay and defraud creditors of the vendor, it is sufficient to show in the first instance the fraudulent intent of the vendor; if then the purchaser shows that he purchased for a valuable consideration, the party assailing his title must show that he had previous knowledge of the fraudulent intent of the vendor, or that he participated in the fraud. *Starin v. Kelly*, 88 N. Y. 418.



## CERTIFICATES.

**1042.** Certificate of deposit given by a bank payable to order after fifteen days, and bearing interest in case the deposit should remain three months and upwards, is a promissory note. *Richer v. Voyer, et. al.*, 5 R. L. 213, S. C. R.

**1043.** A certificate of deposit is evidence of so high and satisfactory a character as to the sum deposited, that, to escape its effects, the maker must overcome it by clear and satisfactory evidence. Where the testimony, aside from the certificate, is balanced as to the amount deposited, the certificate will turn the scale. *First Nat. Bank of Lacon v. Myers*, 83 Ill. 507.

**1044.** When a certificate of deposit by its terms matures six months after date, and is to bear six per cent. interest from date, it will continue to bear the same rate of interest until paid. And where a bank brings up a plain case like this, the judgment will be affirmed with ten per cent. damages. *Cordell v. First Nat. Bank of Kansas City*, 64 Mo. 600.

**1045.** In a suit against a religious corporation where the certificate of incorporation was defective and insufficient to show that the defendant was a corporation. *Held*, first, That the fact that it held itself out as a corporation and treated with the plaintiff as such, did not estop it from denying its liability as a corporation. Second, That the statute law of the State having expressly required certain prescribed acts to be done to constitute a corporation, the omission of those requisites cannot be supplied by the application of the doctrine of estoppel. *Boyce v. Trustees of the M. E. Church*, 46 Md. 359.

**1046.** Certificates of deposit, payable at their return to the bank, properly indorsed, are, in legal effect, promissory notes payable on demand, and the statute of limitations begins to run against them from their date, and that no one can be held a *bona fide* purchaser of them who does not take them within a short time after their issue. *Samuel A. Tripp, et. al. v. Curtenius, et. al.*, 25 Mich. Sup. Ct. Reps. 605; *Gate v. Patterson*, 25 Mich. 191.

**1047.** A certificate of deposit, payable on demand without interest, and a certified check are in a legal sense the same thing, are governed by the same rules, and that no more lapse of time will render such check or certificate past due or dishonored. They are both a promise to pay money on demand, without interest, which indicates an intention to leave it on deposit but for a short time. *Mead v. Merchants' Bank*, 52 N. Y. 147; *Merchants' Bank v. State Bank*, 10 Wall. 648; *Willeys v. Phoenix Bank*, 2 Duer. 121; *Farmers' and M. Bank v. B. and D. Bank*, 4 Kern. 624; *Smith v. Miller*, 43 W. T. 176; *Girard Bank v. Bank of Penn.*, 39 Penn. St. 92.

**1048.** It has been held that the statute of limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and that no special demand is necessary to put the statute in motion. *Brummagin v. Tallant*, 29 Cal. 503.

**1049.** Plaintiff made a deposit with the F. & M. Bank, receiving therefor a certificate payable to his order, on return thereof, with interest. While the certificate was outstanding that bank discounted

plaintiff's note in renewal of a former note held by it; and in the ordinary course of business, and for a valuable consideration, indorsed and transferred the note to defendant, the A. C. N. Bank, before maturity, said defendant receiving it in good faith and in ignorance of such deposit. The A. C. N. Bank then held certain securities as collateral for all paper so transferred to it by said F. & M. Bank. At the time of the transfer the latter bank was solvent, but thereafter was adjudicated a bankrupt, and defendant McL. was appointed assignee. Plaintiff's note was duly protested, and the F. & M. Bank charged as indorser. The A. C. N. Bank still held some of the collaterals; Plaintiff advised it of his deposit and asked that it avail itself of the collateral securities for his benefit, to the amount of the note; this it refused to do, but surrendered the securities to McL., taking from him a guaranty of the collection of the note. No demand for payment of the certificate was made of the F. & M. Bank before it was adjudicated a bankrupt. In an action brought to compel the application of the securities to the payment of the note, *held*, that plaintiff was not entitled to the relief sought; that no right of set-off, either legal or equitable, existed at the time of the transfer of the note; and that the legal rights of the A. C. N. Bank were not so affected by subsequent equities, arising out of the changed relations of plaintiff and the F. & M. Bank, as to require it to first resort for payment to the securities in exoneration of plaintiff; also, that the other creditors of the F. & M. Bank stood equal in law and in equity with plaintiff, and the A. C. N. Bank was bound to regard their interests as well as his. *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

### CHARGES ON BOOK.

**1050.** A person who has charged A. on his books for goods sold, may yet show that they were in fact sold on the credit of a corporation of which A. was agent, and that the corporation received the goods and gave the seller credit for them. *Northford Rivet Co. v. Blackman Manuf. Co.*, 44 Conn. 183.

### CHATTEL MORTGAGES.

**1051.** Taylor mortgaged certain personal property, including a growing crop, to secure advances of goods, etc., to enable Taylor, a planter, to make and gather the crop. The mortgage debt not being paid, Paterson commenced suit to foreclose the mortgage, whereupon the mortgagor interposed that the mortgaged property had been selected and set apart to him as "exempted from forced sale under any process of law." *Held*, that the term "forced sale" as used in the Constitution, is a sale against the will of the owner, and not a sale to which he had expressly consented by giving the mortgage; that having thus for a valuable consideration, given his consent to the



alienation of the property, upon his breach of the condition of the mortgage, he is estopped from revoking it; and the court, in ordering a sale, does but decree a specific performance of the agreement, which agreement was not forbidden by law. *Paterson v. Taylor*, 15 Florida, 336.

**1052.** A chattel mortgage permitting the mortgagor to remain in possession, and to sell, and apply the proceeds, or any part of them, to his own use, is fraudulent and void in law as against creditors. While the holder of a chattel mortgage may relinquish his rights as such, and accept the chattels from the mortgagor in payment of his debt, or as a pledge, such a shifting of title must be open, express and explicit, both debtor and creditor being expressly parties to the payment or pledge, and their acts in that behalf established as expressly and satisfactory as payment or pledge in any other case. *Blakeslee v. Rossman*, 43 Wis. 116.

**1053.** A chattel mortgage given as continuing security to cover present and future indebtedness, is valid not only between the parties, but, when free from fraud, as to creditors. *Brown v. Kiefer*, 71 N. Y. 610.

**1054.** A mortgage may be fraudulent as against creditors, although founded on a valuable consideration. *Brale v. Byrnes*, 20 Minn. 435.

**1055.** Chattel mortgage, made to secure debts maturing at a future day, which conveys a stock of goods in a particular store, and any other goods which may from time to time, during the existence of the mortgage, be purchased by the grantors and put into said store to replace any part of said stock which may have been disposed of, or to increase and enlarge the stock now on hand, is void *per se*. *Phelps v. Murray*, 2 Tenn. Eq. 746.

**1056.** A mortgage of personal property from A. to B., expressed to be "subject to prior mortgages" to a certain amount to C., the amount and terms of which are known to B., conveys only the right to redeem the property from C.'s mortgage, and, although recorded first, does not take precedence of C.'s mortgage. *Pecker v. Silsby*, 123 Mass. 108.

**1057.** It is not necessary to the validity of a mortgage of chattels that it should be in writing. *McKeithen v. Pratt*, 53 Ala. 116.

**1058.** A. sold and delivered to B. certain machinery for the manufacture of a patent machine, the license to manufacture which was to expire at a certain date, and took in payment a note, secured by a mortgage back upon the machinery and referring to an agreement of even date between the parties, by which A. was to retain in payment of the note a part of the price of such machines as B. should make for him. When the license expired a balance was due upon the note which B. failed to pay on demand. *Held*, that A. was entitled to foreclose the mortgage for the payment of the debt secured thereby. *Avery v. Bushnell*, 123 Mass. 349.

**1059.** In Rhode Island a mortgage of personal property to be subsequently acquired conveys no title to such property when acquired, which is valid at law against the mortgagor or his voluntary assignee, unless after acquisition possession of such property is given to the

mortgagee or taken by him under the mortgage. *Cook v. Corthell*, 11 R. I. 482.

**1060.** Although a mortgage of personal property to be subsequently acquired is in itself ineffectual to vest in the mortgagee a legal title to the property, yet if after acquisition by the mortgagor the mortgagee by delivery from, or by consent of the mortgagor, takes possession of the property under the mortgage conveyance, the title to the property both in law and equity vests in the mortgagee without further conveyance or bill of sale. *Cook v. Corthell*, 11 R. I. 482.

**1061.** Although the parties to a chattel mortgage neglect to make and subscribe the affidavit required by Gen. Stats., ch. 123, § 6, and although the mortgage is not recorded, it is nevertheless a valid mortgage as against an attaching creditor, provided possession of the mortgaged property be taken by the mortgagee. *Clark v. Tarbell*, 57 Hall, N. H. 328.

**1062.** Where a mortgage is given to secure several notes held by different parties, a writ of entry to foreclose the mortgage must be in the names of all the owners of the notes. *Noyes v. Barnet*, 57 Hall, N. H. 605.

**1063.** The description in a chattel mortgage should be so explicit as to enable third persons, aided by the inquiries which the instrument itself suggests, to identify the property covered thereby, and a mortgage misdescribing property will not affect the purchase of the same by a third party by imparting to him notice of the incumbrance. *Ivins v. Hines*, 45 Iowa, 73.

**1064.** A chattel mortgage is fraudulent and void as to creditors when it was given with a tacit or express understanding and arrangement that the mortgagee may sell and dispose of the mortgaged property, and apply the avails to his own use. *Potts v. Hart*, 99 N. Y. 168.

**1065.** A mortgagee of personal property cannot maintain an action of claim and delivery to recover possession of the same from a third person, when the mortgage provides that the mortgagor shall retain possession of the property mortgaged. Right of possession is necessary as a basis for action. *Laubenheimer, App. v. McDermott*, 5 Mont. U. S. 320.

**1066.** The doctrine that a preëxisting debt is a valuable consideration for a chattel mortgage is sustained by the weight of authority. See *Jones on Chat. Mort.*, § 81, and cases cited therein, in which he asserts that such a mortgage protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time of the mortgage. *Kranert v. Timon*, 65 Ill. 344; *Macbeth v. Wanless*, 1 Cal. 225; *Paine v. Benton*, 32 Wis. 491; *Buttes v. Houghwont*, 42 Ill. 18; *Prior v. White*, 12 Ill. 261; *Bundy*, 11 Ind. 398.

**1067.** One not having a judgment and execution is not a creditor within the meaning of the provision of the statutes (§ 1, chap. 279, Laws of 1833), declaring that the omission to file a chattel mortgage renders it void as against creditors of the mortgagee, and subsequent purchasers or mortgagees in good faith. *Jones v. Graham*, 77 N. Y. 628.

**1068.** Nor is a person a mortgagee in good faith, within the mean-



ing of said statute, whose mortgage was given for a preëxisting indebtedness without any new consideration. *Jones v. Graham*, 77 N. Y. 628.

**1069.** W. delivered to plaintiff as security, instruments in form and purporting on their face to be issued under the act in relation to warehouse receipts (Chap. 326, Laws of 1858, as amended by chap. 353 of the Laws of 1859, and by chap. 440 of the Laws of 1866.) They were signed by W. and acknowledged the receipt from himself, as owner of the property specified. *Held*, that, as between the parties, they derived no force or efficacy from said act, and in no manner transferred the possession of the property or represented any such actual transfer; that there was no valid pledge or actual warehouse receipt, but a transfer of title, as collateral, which could operate only as a chattel mortgage. *F. & M. Nat. Bank v. Lang*, 87 N. Y. 209.

**1070.** Because a mortgagee of a chattel temporarily uses it with the assent of the mortgagor, and then returns it to him, the mortgage lien upon it is not thereby extinguished.

**1071.** To make applicable the rule that in the absence of a specific appropriation of payments by either the debtor or creditor, the law will appropriate them, there must be some testimony tending to show that no such appropriation has been made by the parties. *Albert, Sheriff v. Lindau*, 46 Md. 334.

**1072.** Chattel mortgage does not protect from execution materials purchased by the execution debtor before it was given. *Held*, that this contract (chattel mortgage) of indemnity only amounted to a mortgage on the materials, and not being filed, did not protect materials that had been sold to the principal before it was executed, from seizure on execution. *Hurd v. Brown*, 37 Mich. 484.

**1073.** A chattel mortgage, as between the parties, is valid, without any acknowledgment; but without the acknowledgment it has no effect upon the rights of third parties acting in good faith, and notice of such a mortgage does not prevent a creditor from subjecting the property to the payment of his debt. *McDowell, et al. v. Stewart*, 83 Ill. 538.

**1074.** The mortgagor of a chattel, with the verbal consent of the mortgagees, sold it to the defendant without notifying him of the existence of the mortgage; but before delivery, and before payment of the purchase money, the mortgagees informed the defendant of the mortgage, and that they would hold him accountable to them for the price. *Held*, that the mortgagees could recover the price of the purchase in an action of assumpsit in their own names. *Bank v. Raymond*, 57 Hall, N. H. 144; *Huntingdon v. Knox*, 7 Cush. 373.

**1075.** When a mortgagee of chattels upon a public sale makes reasonable and fair efforts to sell the property for a good price, and through the acts, statements and notice of the mortgagor at the time of sale, the effect of which is to discourage bidding, and the same does not bring a full price, a court of equity will not set aside the sale on the application of the mortgagor. The effect of a public sale, upon due notice, under a chattel mortgage is to cut off the equity of redemption of a mortgagor. A mortgagee, under a chattel mortgage, may himself become a purchaser on a public sale of chattels. In order to redeem under a chattel mortgage the mortgagor must in good

faith pay or tender the whole mortgage debt, and that before suit brought. Where the plaintiff upon a trial is not found to have just ground for equitable relief, the action cannot be held to adjust rights and claims between codefendants, not related to the cause of action set up in the complaint. *Hall v. Ditson*, 55 Howard, N. Y. 19.

**1076.** Upon the loan of money to be secured by a chattel mortgage on copyrights, music plates, etc., etc., a printing contract between the parties being made at the same time, by which it was agreed that the mortgagees might print music from the plates of the mortgagor, the expense of printing and materials to be borne by the mortgagees, the profits from the music so printed to be divided equally between the parties, it appearing that the loan of the money and the printing contract were part and parcel of one general arrangement in the beginning, but were in fact made afterwards divisible, and after the mortgage was executed, and before the printing contract was made, the option was given to the mortgagors to give up the printing agreement, but they desired it to be made. *Held*, that the transaction was not usurious. *Clark v. Sheehan*, 47 Howard, N. Y. 188; also 55 Howard, N. Y. Practice Reports, 19.

**1077.** A chattel mortgage upon after-acquired goods will hold against a *bona fide* purchaser with notice. He can have no better title than his vendor. *Robson, et. al. v. Mich. Central R. R. Co.*, 37 Mich. 70.

**1078.** Where a chattel mortgage fails to duly describe the property, the defect is cured by the subsequent delivery of the property to the mortgagee, as against parties who have not acquired any rights or interest before such delivery. The delivery, in such a case, must be such an actual transfer of the possession and control of the property that, if it was destroyed, the loss would be that of the mortgagee. A constructive possession will not avail. *Parsons Savings Bank v. Sargent, et. al.*, 20 Kansas, 576.

**1079.** The purchaser of a house and the furniture therein immediately leased the same to the vendor, who remained in possession of the furniture, as lessee, the same never having been out of his possession. *Held*, that, as against creditors of the vendor, the sale of the furniture was void. *Bishop v. O'Connell, et. al.*, 4 Mo. Ct. Appeals, (St. Louis, 578.)

**1080.** In a chattel mortgage made by M. & Co., the goods were described as "two sets of blacksmithing and one set of wagon maker's tools complete," etc., "together with all their floating capital stock in trade, to the value of \$1,000," etc., "connected with the business they carry on in the said village of Watertown, as wagon and carriage builders, general blacksmiths, etc., under the name and firm of M. & Co." *Held*, an insufficient description as regarded the tools. Per Gwynne, J. The mortgage clearly could not pass after acquired goods, for though after acquired goods may be affected in equity, it could only be when the mortgage shows an intention to do so. *Mason v. Macdonald*, 25 Upper Canada, Com. Pleas Rpts. 435.

**1081.** A mortgage of personal property consisting of goods in a merchant tailoring establishment is void as against creditors, where the mortgagors by the consent of the mortgagee continue to carry on business, manufacturing and selling the goods, in the usual course. *City National Bank v. Goodrich*, 3 Colo. 139.



**1082.** Husband and wife gave a note and secured it by a mortgage on her furniture. The husband, with money borrowed of his father, paid the note, receiving the papers into his possession. Immediately afterwards and before separation, by arrangement between all parties except the wife (who was not present), the note and mortgage were assigned by the mortgagee to the father. *Held*, that the wife would hold the property clear of the incumbrance by mortgage. The father would have no right in the mortgage by subrogation, being under no obligation to pay it, and having no interest in it when it was paid. *Moody v. Moody*, 68 Me. 155.

**1083.** A chattel mortgage is in law a conveyance of the goods and chattels mortgaged, and passes the title of the mortgagor for the purposes for which it was made. The right of a mortgagee, under a mortgage made by a tenant of his goods and chattels upon the demised premises, is superior to that of a bailiff subsequently seizing them under a warrant to distrain for rent. But a chattel mortgage in this State is regarded as a mere security for the debt, and does not entirely divert the property of the mortgagor. The interest of a mortgagor in the chattels mortgaged is such an interest as may be seized and sold under ordinary process of law against him. *Woodside v. Adams*, 40 N. J. L. R. 417.

**1084.** Goods in possession of mortgagee—exemption from seizure under writ of attachment in insolvency. *Held*, that goods and chattels in the possession of a mortgagee of them cannot be seized and sold, the proceeds paid over to a sheriff acting under a writ of attachment in insolvency against the mortgagor. *Held*, also, that the possession of the defendant to whom such goods had been sent by the plaintiff, the mortgagee, to be sold, and their proceeds paid over to him, was the possession of the mortgagee; and defendant having in such case assented to the seizure by the sheriff, and acting under his directions, sold the goods and paid over the proceeds, was liable to repay them to the mortgagee. *Watson v. Henderson, et. al.*, 25 Upper Canada, Com. Pleas Rpts. 562.

**1085.** If the holder of a chattel mortgage had taken possession of the chattels under his mortgage, before the judgment creditor recovered his judgment, will not give validity to the mortgage as against the latter, if the mortgage was not filed according to the provisions of the act concerning mortgages, and there were not immediate delivery and continued possession of the goods, according to the provision referred to. A mortgage of after-acquired property can only attach itself to such property in the condition in which it comes to the mortgagor's hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires. *Williamson v. New Jersey R. W. Co.*, 28 N. J. Eq. 277.

**1086.** Chattel mortgage. An immaterial variation between a chattel mortgage and the copy subsequently filed does not invalidate the refile. A mistake in the number of the lot where the chattels were, was held to be immaterial under the circumstances. The statement annexed to the affidavit with a copy of the mortgage, did not give distinctly all the information required by the act, but the affidavit and statement together contained all that was necessary.

*Held*, sufficient, the statement contained an item of \$2.25 as paid for refiling, which the mortgagee had no right to charge: *Held*, not to vitiate the instrument. A chattel mortgage was given for \$1,070; it afterwards appeared that the amount was made up in part of a promissory note made and given by the mortgagee to the mortgagor at the time of the execution of the mortgage and not paid for some months afterwards. *Held*, that in the absence of fraud the mortgage was valid. *Walker v. Niles*, 18 Grant's Chancery, Ontario, 210.

**1087.** The holder of a chattel mortgage agreed to assign his mortgaged interest to a third party who proposed to purchase the chattels of the mortgagor but had no other interest in the mortgage, and who never became the owner of the equity of redemption. The agreement contained the following clause: "In case of failure to pay said notes, or either of them, or the interest, the said party of the first part (the mortgagee) resumes the right to foreclose said mortgage, or take or sell said property, the same to all intents or purposes as if said notes below mentioned were the notes mentioned and specified in said mortgage, and it being the intent hereof to allow said mortgage to remain as security for the payment of the notes below mentioned. *Held*, that this agreement was collateral to the mortgage, and that the payment of one of the notes was not a payment *pro tanto* of the mortgage debt. The mortgagee has previously insured his interests as a mortgagee for \$57,000. After a partial payment of \$20,000 by the proposed buyer of the property mortgaged there was a loss by fire of \$53,000 on the mortgaged property. *Held*, that the insured rights of the mortgagee was not impaired or diminished by such partial payment. The proposed purchaser of the goods mortgaged agreed to keep them insured for the benefit of the mortgagee. This he did not do, and the mortgagee insured his interest as mortgagee in his own name. *Held*, that a liability of the proposed purchaser for the cost of the insurance under his contract with the mortgagee, did not affect the contract between the mortgagee, and the insurers. *Haley v. Mfrs. Fire and Marine Ins. Co.*, 120 Mass. 292.

**1088.** When chattel mortgage was executed it was agreed between the parties that the mortgagor may go on and sell the stock and use the proceeds, generally, in his business, and this agreement is carried out by permitted sales, the transaction is fraudulent in law as against the creditors of the mortgagor. *Southard v. Benner, et al.*, 72 N. Y. App. 424.

**1089.** A mortgage of a certain described horse, and all other live stock of which the mortgagor may become owner during the year, gives a valid lien upon any horse or other animal which the mortgagor may acquire during the given year, by one or more exchanges of the first mortgaged horse and his successors. *Davis v. Marx*, 55 Miss. 376.

## CHECKS.

**1090.** A garnishee order was made under Order XLV., Rule 2, attaching a debt. At the time the order was made the garnishees had given the judgment debtor a check for the amount of the debt. Upon



service of the order on the garnishees they stopped payment of the check at the bank, the check not having been presented. *Held*, that upon the check being stopped it was as if it had never been given, and that there was therefor an existing debt capable of being attached, and the garnishee order was effectual. *Cohen v. Hale*, 3 App. Cas. (41 Victoria Law Report, Eng.) 371.

**1091.** If a partner consents that a check of the firm be applied on an individual debt of his copartner, he may, at any time before such application is in fact made, or the rights of third parties intervene, withdraw such consent, and after notice by him, not to so apply the check, it cannot be so applied. *National Bank of Jacksonville v. Mapes, et al.*, 85 Ill. 67.

**1092.** Check contained this recital: "To hold as collateral for 1,000 P. T. oil, pipage paid," etc., and across its face the cashier of the bank certified "Good when properly indorsed." *Held*, that this check was not drawn in the usual course of banking business and the certificate of the cashier would not bind the bank. *Dorsey v. Abrams*, 85 Penn. 299.

**1093.** The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn. *Held*, that until the check was either paid or accepted, the gift was incomplete, and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check. *Simmons v. Savings Society*, 31 Ohio, 457.

**1094.** The giving of a check by the debtor with the intention of appropriating it to the debt of the plaintiffs, and the giving of a receipt therefor by the plaintiffs' agent, acting within the scope of his authority, constitute by the law of Canada an appropriation as intended. Such appropriation could only be changed by a rescission of the appropriation made by consent of all parties interested. In an action against the agent for moneys had and received on account of the plaintiffs, such rescission, being put on the footing of a contract by the Canadian law, must be specially pleaded as a defence. *Kershaw v. Kirkpatrick*, 41-42 Eng. Law Reports, 3 App. Cases, 345.

**1095.** When checks on another bank are handed by a depositor to the receiving teller of a bank, and are by the teller credited on the depositor's pass book, they are only received for collection, and if not paid on presentation, may be returned and the credit in the pass book canceled. *National Gold Bank v. McDonald*, 51 Cal. 64; *Boyd v. Emerson*, 2 Adolphus & Ellis, 184.

**1096.** Without deciding the mooted question whether a check or draft of a person on a bank in which he has deposits operates as an equitable assignment of the fund so on deposit to the holder of the check to the amount of it, it is clear that such check or draft does not bind the fund in the hands of the bank until it has notice of the draft or check by presentation for payment, or otherwise: until then, other checks drawn afterward may be paid, or other assignments of the fund, or part of it may secure priority by giving prior notice. *Laclede Bank v. Schuler*, 120 U. S. 511.

**1097.** A check is an appropriation of so much of the maker's funds in the bank upon which it is drawn as is necessary to meet it; hence the maker cannot object to any delay in presenting it, unless he

can show special injury to himself arising therefrom. If the maker has withdrawn from the bank his entire deposit against which the check is drawn he is not injured by any delay in presenting it, or any lack of formal notice of its non-payment, before action brought. *Emory v. Hobson*, 63 Me. 32.

**1098.** The rightful possession of a check made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee. If the drawee relies upon false representations as to identity, for which neither the drawer nor payee are responsible, he to identify, for which neither the drawer nor payee are responsible, he makes payment to a wrong person, at his peril. *Dodge v. Nat. Ex. Bank*, 30 Ohio, 1.

**1099.** A bank which pays out money on a check, purporting to be signed by a depositor, but the signature on which is in fact forged by his clerk, is not, in the absence of evidence that the clerk has, or was supposed by the bank to have, any authority to sign the depositor's name, exempt from liability to the depositor, by proof that the forgery was committed on a blank form taken from the depositor's check book, which was left lying about in his office during the day; that it was stamped with a hand stamp, sometimes used on his checks, and which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the officers of the bank as the person who was authorized to receive money on the depositor's checks. *Mackintosh v. Eliot National Bank*, 123 Mass. 393.

**1100.** Where upon the face of a check it is apparent that it was not drawn in the usual course of business, that it was not a commercial check, a cashier has no authority to certify such a check, and such certificate is not binding upon the bank, nor can it be made so by any subsequent acts of ratification by said cashier. *Dorsey v. Abrams*, 85 Penn. 299.

**1101.** If a customer of a bank hands the receiving teller a check drawn by another person upon the same bank, and at the same time hands him his pass book, and the teller receives the check and enters a credit for the amount in the pass book, but no entry is made on the books of the bank, and nothing else is said or done, and the drawer has no funds in the bank, the check may be returned to the depositor and the credit in the pass book canceled. In such a case, a finding by the court that the check was received as a cash deposit is erroneous. *National Gold Bank v. McDonald*, 51 Cal. 64.

**1102.** The payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them. *So held*, where a check of the Treasurer of the United States upon a national bank duly designated as a depository of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its owner against the bank. *First National Bank of Washington v. Whitman*, 94 U. S. 343.

**1103.** The rights of the parties are not changed by the fact, on a settlement of accounts between the treasurer and the bank, the check, on the supposition that it had been properly paid, was credited to the



bank. Such an error does not effect the real state of the accounts; when it is discovered, they are open to correction. *Ibid.*

**1104.** Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amounts as upon an accepted check. *Ibid.*

**1105.** A check was drawn to Cook; Barnes indorsed Cook's name without his authority and received the money; the bank deducted the check from the drawer's account and settled with him on that basis. —*Held*, that Cook could recover the amount of the check from the bank. The conduct of the bank was an acceptance and bound it as a certified check would. *Seventh National Bank v. Cook*, 73 Penn. 483.

**1106.** The protest of a dishonored check is not a written instrument which can be made the basis of an action, and in an action by the payee, against the drawer, of such check, a copy of the protest forms no part of the complaint, and cannot aid its averments.

**1107.** If, in such action, the complaint fails to aver that the defendant has been notified of the non-payment of such instrument, or alleges no excuse for the failure to give such notice, it is sufficient on demurrer. *Griffin v. Kemp*, 46 Ind. 172; also, *Pollard, Adm'r v. Bowen*, 57 Ind. 232.

**1108.** The same rule applies to checks as does to bills of exchange and indorsed promissory notes, in regard to the diligence to be used in presenting them for payment. See *Edwards on Bills and Promissory Notes*, pages 57, 389, 391 and 890; also, decision in 57 Ind. 232.

**1109.** A check given to carry out an agreement made in contravention of the provision of the Bankrupt Act (§ 45), prohibiting officers of courts in bankruptcy from taking anything other than the fees allowed by the act for acts done under it, is not absolutely void; notwithstanding the illegality of the consideration, it is valid in the hands of a *bona fide* holder for value, taking it, before it is dishonored, without notice of its illegality. The burden of showing that the transferee had notice of the infirmity in the paper is upon the party seeking to impeach his title. *Cowing v. Altman*, 71 N. Y. 435.

**1110.** Checks are not money and a board of county commissioners has no right or authority, in their settlement with treasurer, as provided by statute, to accept and count as money the checks of third parties. *Commissioners v. McCormick*, 4 Mont. 115.

**1111.** Where a bank directs checks drawn upon it to be presented for payment to another bank, if a check be there presented and payment refused, the drawer is discharged, if notice of non-payment be not given, though the check be presented to the drawees on the following day, but they had failed in the *interim*. *East River Bank v. Gedney*, 4 E. D. Sm. 582.

**1112.** If the bank on which a check is drawn, be enjoined from making any payments by an injunction out of chancery, half an hour after being opened for business, on the day following that on which it was given, the holder is excused from presentment, and may recover on the original consideration. *Lovett v. Cornwall*, 6 Wend. 369; S. C., 1 Hall, 56.

**1113.** A check drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any

part of any amount standing to the credit of the drawer, does not operate as an assignment, equitable or otherwise, of funds of the drawer, in the hands of the drawee; and it is immaterial that the drawee is not a bank. *In re Merrill*, 71 N. Y. 325.

1114. The holder of a check, on whom it has been fraudulently passed, in payment of a preëxisting debt, is not bound to present it, before bringing suit on his original cause of action. *Devoe v. Moffatt*, Anth. N. P. 221.

1115. A check, it is true, is a payment until presented and refused; but a bill is payment only if it be so agreed, and if payment by bill be part of the agreement, it must be evidenced in writing. *Chitty*, 681. *Mahalen v. The Dublin & Chapelized Distillery Co.*, 2 Irish Reports, Common Law Series, 83.

1116. A verbal agreement between the payee and the drawer of a check, contemporaneous with its execution and delivery, that the former will not present it to the drawee for payment until a certain time, is sufficient excuse for a delay until the time specified in presenting it for payment. Demand for the payment of a check, and notice of non-payment of the same, are no part of the contract between the drawer and payee, but are steps in the legal remedy of the latter. *Pollard, Adm. v. Bowen*, 57 Ind. 232.

1117. No protest for non-payment of a check drawn upon a bank is necessary to render the drawee liable to payee. *Pollard v. Bowen*, 57 Ind. 232.

1118. The date of a check is *prima facie* evidence of the time it was made and had its inception; and if found in the hands of the payee or third person for a considerable time (in this case fourteen months) after its date, will be deemed to be discredited. A party taking it is put upon inquiry, and, in the absence of explanation, takes subject to any defence existing as between the payee and drawer.

1119. Check, however, has no inception until delivery, and for all legal purposes is to be considered as made on the day it is delivered; when the date and the time of the delivery are not the same, the latter may be shown in answer to any such defence. A party negotiating for it, who ascertains that the check was in fact delivered on the day it is offered to him, is not bound to go further and inquire as to any other objection to it; and if he takes it *bona fide*, for value, without notice of illegality or other defence, and it appears that it was in fact delivered on the day it was negotiated, he stands in no worse position than if he had first inquired and been informed of this fact. When, therefore, a check is delivered by the drawer to the payee long after its date, and is upon the same day transferred by the latter to a *bona fide* purchaser for value without notice of any defence, it is valid in his hand, notwithstanding a defect or illegality in the consideration which would be a good defence as between the drawer and payee. *Ibid.*

1120. Accordingly, *held*, where, in pursuance of an arrangement between an assignee in bankruptcy and creditors, a check for additional compensation over and above his fees, dated on the day it was made, was deposited with a third person, to be delivered to the payee when he was discharged from his position as assignee, which check remained in the hands of the depository for fourteen months, and was then delivered upon the order of the payee, on the day the latter was



discharged as assignee, to a *bona fide* purchaser from him for value, that the check had inception only on delivery, and that, in the absence of evidence of notice to the purchaser, of any defence, he, or his transferee, could, upon its being presented for payment and dishonored, enforce it against the drawer. *Cowing v. Altman*, 71 N. Y. 435.

**1121.** An order, check or draft, to have the effect of an equitable assignment, must be drawn on a particular, specified fund. *In re Merrill*, 71 N. Y. 325.

**1122.** Accordingly, *held*, where an insurance company gave its check upon a trust company, in payment of a loss, the company having at the time on deposit a sum exceeding the amount of the check, but, prior to its presentation, a receiver of the company was appointed, who withdrew all the funds deposited, that the check, not having been drawn on a particular fund, did not operate as an equitable assignment *pro tanto* of the deposit; and that, the claim having been only liquidated, not paid, when the company failed and went into the hands of the receiver, whereby the rights of all the creditors became fixed by the statute, the payee of the check was not entitled to have the same paid by the receiver out of the funds, in preference to the claims of other creditors. Also, *held*, that the fact that there was a receipt on the back of the check—intended for the signature of the payee—did not effect its negotiability of the particular fund. *In re Merrill*, 71 N. Y. 325.

**1123.** Where money is paid on a "raised" check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration. *Espy v. Bank of Cincinnati*, 18 Wallace, U. S. 604.

**1124.** A person intrusted with a check by the payee to pay into bank absconded with it, and after altering the date from the 2d of March to the 26th of March, passed it to the plaintiff for value. The check was not paid and the plaintiff, who had not been guilty of any negligence in taking the check, sued the drawer. *Held*, that the alteration was material and invalidated the check; and that the circumstance that the plaintiff had not been guilty of negligence in taking it was immaterial. *Vance v. Lowther*, 1 L. R., Exch. Div. 176; 45 L. J., Exch. Div. 200; 34 L. T. N. S. 286; 24 W. R. 372.

**1125.** Unless there is something in the term in which information is asked that points the attention of the bank officer beyond these two matters, his verbal response that the check is "good" or "all right" will be limited to them, and will not extend to the genuineness of the filling-in of the check as to payee or amount. *Ibid.*

**1126.** Where a party to whom such a check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what he replied on these points. *Ibid.*

**1127.** The drawer of a check made payable to the order of the payee, is not bound by a payment thereof by the bank, upon a forged indorsement of the name of the payee; it is bound, before payment, to ascertain the genuineness of the indorsement. *Welsh v. Ger. Am. Bank*, 73 N. Y. App. 424.

**1128.** A depositor owes no duty to a bank requiring him to ex-

amine his pass book, or returned checks, with a view to the detection of forgeries in the indorsements. He has a right to assume that the bank, before paying his checks, will ascertain the genuineness of the indorsement. *Ibid.*

**1129.** A dishonored check need not be protested to bind the maker. *Henshaw v. Root*, 60 Ind. 220.

**1130.** A check on a banker is a negotiable instrument and the indorser is liable to the holder. *Keene v. Beard*, XC. VIII. 372; 8 C. B. N. S. 372. (Eng. Com. Law.)

**1131.** Where, in an action against a partnership, on a dishonored check, executed in the firm name, the execution of the check is not denied by plea under oath, and the check is introduced in evidence without objection, the existence of the partnership is thereby admitted. Where, in an action against a partnership, the existence of the partnership may be inferred from the evidence, a finding of that fact will not be disturbed for want of direct evidence thereof. *Henshaw v. Root*, 60 Ind. 220.

**1132.** In an action against the maker on a dishonored check, the complaint, setting out a copy thereof, alleged its execution and delivery, its presentation on the day it was issued for payment, its dishonor and notice thereof to the defendant; and that the defendant at the time of its issue had no funds deposited for its payment. *Held*, on demurrer, that the complaint is sufficient. Mere delay in giving notice to maker of the dishonor of his check does not discharge him from liability thereon, but he is entitled to whatever damage he may suffer by reason of such delay. *Henshaw v. Root*, 60 Ind. 220.

**1133.** A check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts; yet it is only *prima facie* evidence of money lent, paid and advanced, or had and received; and where it is proved that no money had come to the hands of defendant, the presumption raised by the check is rebutted, and no recovery can be had on these counts. *Blair & Hoge v. Wilson*, 28 Grattan (Va.) 165.

**1134.** The rights of a checkholder and of the bank are fixed when the check is presented for payment, and the bank has no right to pay or satisfy out of the fund thus appropriated other checks or demands subsequently presented, or demands which subsequently accrued to the bank or others; nor can the bank retain the money against the check holder, under claim of an equitable lien for a debt by the drawer of the check not yet matured. *Zelle, et. al. v. German Savings Inst.*, 4 Mo. Appeal Reports (St. Louis) 401.

**1135.** Where a check, given in payment of a debt, is dishonored, action need not be brought for such debt, but may be maintained on the check. *Henshaw v. Root*, 60 Ind. 220.

**1136.** The holder of a check, by the mere fact of its being drawn in his favor, acquires no right of action in equity, as upon an equitable assignment, against the person upon whom it is drawn. To an action by plaintiffs against defendants for their refusal to pay a check, drawn by plaintiffs and one W. on them, defendants pleaded, on equitable grounds, that before the drawing or presentment of the check in question the plaintiffs and W. had drawn and delivered to various persons



certain other checks, amounting in all to the whole of their funds in defendants' hands, which were presented before this check; that neither at the time of the drawing, nor presentment of the first-drawn checks or the check in question, had defendants more than sufficient funds in their hands to pay the first-drawn checks, as the plaintiffs and W. well knew; and that afterwards, and before the commencement of this action, defendants paid the holders of the first-drawn check the amounts thereof, and thereby paid and disbursed all the plaintiffs' and W.'s moneys in their hands, and afterwards settled with the plaintiffs and W. their banking account in full. *Held*, plea bad, for the previous presentment and dishonor of the first-drawn checks not creating any lien on the funds, and it being admitted that at the time of the presentment of the checks in question there were sufficient funds to meet it, such funds were applicable to its payment; and moreover, it was quite consistent with the plea that at the time of the presentment of the first-drawn checks defendants had no funds to meet them, and that after their dishonor they were placed in funds when the check in question was presented and dishonored, and that the first-drawn checks were then presented a second time and honored. *Caldwell v. Merchants' Bank*, 26 Upper Canada, Com. Pleas, 294.

**1137.** While the giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it was given, yet such check may, by agreement of parties, be given and received in full payment and absolute discharge and satisfaction of the debt; and whether it was so given or received is a question of fact for the jury. *Blair & Hoge v. Wilson*, 2 Grattan (Va.) 321.

**1138.** Where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. *Haynes v. Rudd*, 83 N. Y. 251.

**1139.** A check is a bill of exchange within the statute (1 R. S. 768, § 6), declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance is in writing. *Risley v. Phenix Bank*, 83 N. Y. 318.

**1140.** A verbal promise by a bank, therefore, to pay a check, does not create a cause of action thereon. *Risley v. Phenix Bank*, 83 N. Y. 318.

**1141.** Where a debtor pays his debt by a check to the order of his creditor of one nominated by the latter, and the check is lost by or fraudulently obtained from the creditor, and is paid to the finder or fraudulent holder on a forged indorsement of the payee, the debtor is not discharged and may be again called upon to pay his debt; at least unless the check was taken in absolute payment and extinguishment thereof. *Thomson v. Bank of British N. Am.*, 82 N. Y. 1.

**1142.** A check payable to order may be transferred by the payee by parol, with manual delivery without indorsement, but the transferee in such case acquires only the rights he would have had, had the check been originally non-negotiable, *i. e.*, the right which the payee had in it at the time of the transfer. *Freund v. Im. and Traders' Nat. Bank*, 76 N. Y. 352.

**1143.** Neither the fact that a check was dishonored when transferred, nor that presentment for payment has been delayed, discharges the drawer. If dishonored, any defence thereto against the payee will be available against his transferee; but no presumption arises that overdue or dishonored paper is invalid. If loss results to the drawer by delay in presentment, that is matter of defence. *Cowing v. Altman*, 79 N. Y. 167.

**1144.** The bank certifying a check is primarily liable for its payment. A bank or agent for collection of a certified check should not send such check to certifying bank itself for payment. This would be putting the instrument in the hands of the party primarily liable and enabling him to destroy the evidence of debt and repudiate the transaction. This would not be using reasonable care. *Drover's Nat. Bank of Union Stock Yards, Ill. v. Anglo-American Packing and Provision Co.*, 7 N. E. Rep. 601; Citing—*Merch. Nat. Bank v. Goodman*, 2 Atl. Rep. 687; *Bickford v. First Nat. Bank*, 42 Ill. 242; see—*Indig v. City Bank*, 80 N. Y. 106.

**1145.** By certifying a check a bank undertakes only that the signature is genuine; that the plaintiff has sufficient funds in the bank to meet it; and that such funds shall not be withdrawn. *Security Bank v. Nat. Bank of the Republic*, 67 N. Y. 458.

**1146.** A bank is liable on a check certified by it whether the drawer had funds sufficient or not. *French v. Irwin*, 4 Baxt. 401.

**1147.** Payee of check cannot maintain action against drawer without acceptance. *Bank v. Whitman*, 4 Otto. U. S. 343; *Bank v. Millard*, 10 Wallace, U. S. 152; 3 *Cent. Law Journal*, 46 (Jan. 21, 1876.)

**1148.** Quite a difference between checks and bills of exchange. *Lester v. Gibbon*, 8 Bush. 360.

**1149.** Checks are not entitled to days of grace. *Am. Law Reg.* Jan. 1873; *Champion v. Gordon*, (Supct. Pa.); *Buckner v. Sayre*, 18 B. Mon. 745.

**1150.** Death of drawer rescinds authority of bank to pay check. 3 *Man. and Gr.* 471; *Chitty on Bills*, 479.

**1151.** The transferee, however, in such case, acquires only the rights he would have had, had the check, been originally non-negotiable, *i. e.*, the right which the payee had in it at the time of the transfer. *Freund v. Im. & Tr. Nat. Bank*, 76 N. Y. 352.

**1152.** A check, payable to order, may be transferred by the payee by parol, with manual delivery, without indorsement. *Freund v. Im. & Tr. Nat. Bank*, 76 N. Y. 352.

**1153.** Plaintiffs drew their check upon defendant's bank, payable to the order of M. O. & Sons, and delivered it to the payees, for their accommodation, and without restriction as to the use of it; the payees delivered it unindorsed to N. B. & Sons, in payment of a prior indebtedness, and it was so applied. N. B. & Sons procured the check to be certified by defendant; afterwards plaintiff notified defendant not to pay it; defendant, however, paid it to N. B. & Sons. In an action by plaintiffs to recover the amount so paid, as a balance of their deposits: *Held*, that at the time of the certification N. B. & Sons were the owners of the check, with the right to enforce it against the drawers, the existing debt being a sufficient consideration for the transfer; that



the certification, therefore, had the same legal effect as if the check had been properly indorsed; that by the certification defendant became bound to pay; and that therefor the action was not maintainable. *Freund v. Im. & Tr. Nat. Bank*, 76 N. Y. 352.

**1154.** When action maintainable against bank by drawer of check to recover amount paid thereon, when it has been lost or fraudulently obtained from payee and his indorsement forged. *Thomson v. Bank British No. Am.*, 82 N. Y. 1.

**1155.** In action on check against drawer, presumption in favor of its validity, and burden is upon defendant to show want of consideration. *Raubitschek v. Blank*, 80 N. Y. 478.

**1156.** Where the holder of a promissory note, ostensibly acting for himself, sells the same for a valuable consideration, and upon the sale, promises orally that the note is good and will be paid at maturity, the promise is not within the statute of frauds, and the promisor is liable thereon in case of non-payment. *Milks v. Rich*, 80 N. Y. 269.

**1157.** Defendant and H. negotiated for the exchange of certain real estate; the terms were agreed upon verbally by them; defendant was to pay a sum agreed upon as the difference in the values of the lands to be exchanged; he gave to H. a check for \$500, as a payment, receiving therefor a receipt signed by H. In an action upon the check, parol evidence was given as to the contents of the receipt, it having been lost, which was to the effect that it stated that the check was received on account of the exchange of said lands, specifying them, and then stated the terms, *i. e.*, the price of each piece of property, the amount of mortgages to be executed, etc.; it did not appear that the terms of credit were specified. Defendant thereafter refused to enter into a written contract, as was agreed, and stopped payment of the check. *Held*, that the burden was upon defendant to show a failure of consideration; that as it did not appear that the terms of credit were not in the receipt, as every presumption was in favor of the validity of the check, this was to be presumed; that the receipt taken in connection with the check contained the material elements of a contract, sufficient and valid under the statute of frauds, and enforceable in equity against H.; and that, therefore, there was a good consideration for the check. *Raubitschek v. Blank*, 80 N. Y. 478.

**1158.** Plaintiff held the check as assignee of H., who died prior to the trial. *Held*, that defendant was incompetent, under section 399 of the Code of Procedure, to testify to the personal transactions between him and H. *Raubitschek v. Blank*, 80 N. Y. 478.

**1159.** B. P. & Co., being indebted to plaintiff, gave to it their check in settlement of the balance due; the check, on presentation, was dishonored for want of funds; it was presented to the bank on several subsequent occasions but was not paid, and said firm at no time had funds in the bank to pay it. Defendant executed a note for the accommodation of one W., who indorsed it before maturity to said firm, by whom it was delivered to plaintiff in part payment of their debt; plaintiff, at the time, surrendered the check. *Held*, that such surrender did not constitute plaintiff a *bona fide* holder for value so as to shut out the defence that the note was wrongfully diverted, by the payees, from the purpose for which it was made. *Phoenix Ins. Co. v. Church*, 81 N. Y. 218.

**1160.** The authorities holding that the surrender by a creditor of the debtor's own note, on receiving the negotiable note of a third person is a parting with value, collated and distinguished. *Phoenix Ins. Co. v. Church*, 81 N. Y. 218.

**1161.** A check is not an equitable assignment of the drawer's balance at his bankers. *Hopkins v. Forster*, 19 English L. R. Eq. 74; 23 W. R. 301 R.

**1162.** To a declaration on a check, the defendant pleaded that he was induced to sign a check by the fraud of the plaintiff. *Held*, that the plea imported an allegation that the defendant, on discovering the fraud, disaffirmed the contract, and that the defendant was not entitled to a verdict on a traverse of the plea, it appearing that he had not disaffirmed the contract. *Dawes v. Harness*, 44 L. J. C. P. 194; 33 L. T. N. S. 159 English Reps.

**1163.** A creditor to whom a check or other negotiable security is given on account of a preëxisting debt, holds it by an indefensible title, whether it is payable at a future time or on demand. *Currie v. Misa*, 44 L. J. Exch. 94; 10 L. R. Exch. 153; 23 W. R. 450 Exch. Chamber.

**1164.** The payee of a check drawn on the Union Bank of London, Eng., payable to him or his order, indorsed his name on it, and crossed it with two lines and the name of his bankers, the London and county bank. The check was stolen, and ultimately came into the hands of a *bona fide* holder for value, who paid it to his banker, the London and Westminster Bank. They presented it to the Union Bank of London, who, notwithstanding the crossing, paid the amount. In an action by the payee to recover the amount from the Union Bank of London: *Held*, that although by 21 and 22 Vict. C. 79, § 2, the Union Bank of London was bound to pay only through the London and county bank, yet the payee had ceased to be holder of the check, he could not recover either for the breach by the Union Bank of London of the duty created by the statute, or on an allegation that they had converted the check. *Smith v. Union Bank of London*, 44 L. J. Q. B. 117; 10 L. R. Q. B. 291; 32 L. T. N. S. 456; 23 W. R. 652; affirmed on appeal, 33 L. T. N. S. 557 C. A.

**1165.** Bank is not liable to pay check drawn thereon by a depositor, except by its acceptance thereof in writing. *Lynch v. First Nat. Bank*, 107 N. Y. 179.

#### COLLATERAL.

**1166.** A creditor who holds railroad bonds as collateral security for a debt is not bound by an unexecuted promise to the debtor, made without consideration, to give them up. Nor does he lose his right to hold such bonds by suing the principal debtor and recovering execution, and arresting the body of the debtor thereon. *Smith v. Strout*, 63 Me. 205.



## COLLECTIONS.

**1167.** When a draft is indorsed over for collection, the indorsee is not a *bona fide* holder for value, though a creditor of the indorser. *Philbrick v. Dallett*, 2 J. & Sp. 370; S. C., 43 How. N. Y. 409.

**1168.** Liability for moneys collected by subagents. Collection agents, to whom notes are intrusted for collection, are liable for moneys received by attorneys employed by them, and which are not paid over, although the receipt given for claims when deposited for collection states: "avails are to be promptly paid over on receipt by us." *Held*, that the defendants' true relation and liability are not at all affected by this language. The money was received by them in law when collected by the subagent. The receipt was intended as an assurance of prompt payment over and nothing more. *Mondel, et al. v. Mower, et al.*, 55 Howard, N. Y. 242.

**1169.** An attorney-at-law, employed to collect a debt, may receive payment thereof in money, but has no right to accept anything else in satisfaction without express authority from his client, and if he does it will be no payment unless ratified or assented to by his client. He cannot give the debtor an acquittance of the claim by receiving payment thereof in a debt, he, the attorney, owes the debtor.

**1170.** He has no right to accept notes, bonds, etc., of the debtor, as collateral security for the debt, without express authority from his client, and if he does so, his client will not be bound unless he assents to or ratifies the same. If an attorney, without the authority of his client, accept bonds, etc., of the debtor, with the understanding that he is to collect them and apply them as payment on the claim when collected, in that transaction he is the attorney of the debtor, and not the attorney of his original client. As soon, however, as he receives any money on the claims thus put in his hands for collection by the debtor, it is a payment to that extent, less his fees for collecting, upon the claim of his original client. *Wiley v. Mahood, et al.*, 10 West Virginia, 206.

**1171.** A firm in Michigan left for collection with the plaintiffs, a bank in that State, a sight draft of their own for \$500, on "J. C., treasurer of the M. S. Co." a manufacturing corporation in Connecticut. The plaintiffs at once sent the draft to the defendants, a bank in Connecticut, with directions to "return at once without protest if not paid." The defendants presented the draft to the drawee, and he replied that he would look up his account with the drawers and inform the cashier with regard to payment. The drawers had also written J. C. that such a draft had been forwarded, and he wrote them in reply: "The \$500 draft has been received and paid. Don't draw any more." On the receipt of this letter the drawers showed it to the plaintiffs, who, believing the draft had been duly paid the drawers the \$500. J. C., the drawee, was also president of the defendant bank, and this fact was known to the plaintiffs. The draft had not in fact been paid, though the drawee supposed it had, but the defendants had neglected to return it or send notice of its non-payment. If they had returned it at once it would have prevented the payment of the \$500 to the drawers. Several days later the cashier returned the draft unpaid,

which was his first information to the plaintiffs with regard to the matter. The plaintiffs thereupon demanded repayment of the drawers, which was refused. They were solvent, but had no visible property, and the claim could not have been collected without much difficulty.

**1172.** *Held*, 1. That the defendants, as agents of the plaintiffs for the collection of the draft, had been guilty of negligence in not obtaining payment of the draft or returning it at once to the plaintiffs.

**1173.** 2. That, although the plaintiffs paid the money to the drawers upon the statement of the drawee to the drawers that the draft had been paid, yet, as they would have been saved from loss if the defendants had performed their duty, the defendants were liable for the actual damages resulting from their neglect.

**1174.** 3. That these damages were to be regarded as the whole amount paid by the plaintiffs to the drawers, and that they had a right to recover this sum, although they had a right of action for the whole amount against the drawers. *Merchants' and Manufacturers' Bank v. Stafford Bank*, 44 Conn. 564.

**1175.** There can be no legal compromise of a criminal charge, where the person has not been arrested, nor in any way held to answer the charge. In effecting a compromise of larceny, under the statute, the person whose property has been stolen has no right to exact or receive from the person committing the larceny, anything more than the property stolen or its value, and the necessary expense of reclaiming it. *Saxon v. Hill*, 6 Oregon, 388.

**1176.** The bank had for collection a draft by Lane on Gibson, and received \$60.40 in money, and a sight draft and a ten days' sight draft on B., in settlement of L.'s draft on G. B. paid one draft and accepted the other at ten days. Upon maturity the bank presented it to B. for payment, which was refused, and the bank did not cause the draft to be protested, so as to charge the drawer. *Held*, that the bank, by failing to have the draft protested, has become liable to L. for the amount of the draft. A bank which receives a note or bill for collection is bound to use due and proper diligence in making demand, and giving notice, and causing protests to be made, so as to hold all parties liable, and in default of such diligence the bank becomes responsible to the party who deposited the note or bill. *Capital State Bank v. Lane*, 52 Miss. 677.

**1177.** Action upon the note, *held*, that B. was liable; that her signature would be considered as having been placed to the note at its date, and this although B. did not know of the arrangement; that it was sufficient if she signed at the request of M., who had given the assurance. *Harrington v. Brown*, 77 N. Y. 72.

**1178.** Plaintiff sent to defendant, its correspondent in the city of New York, for collection and credit, a sight draft, drawn by a bank in Meadville, Pa., upon C. P. & Co., bankers in that city; on the morning of its receipt defendant presented it to the drawees for payment, received their check for the amount, and delivered the draft to them. Defendant did not present the check for payment on that day; it was presented the next day, when the bank refused to pay, C. P. & Co., having failed. Defendant on the same day returned the check to C. P. & Co., received back the draft, formally demanded payment thereof, caused the same to be protested for non-payment, and on the next day due



notice of non-payment was served by mail upon plaintiff and upon the drawer. In an action to recover damages for alleged negligence on the part of defendant, *held*, that it was the duty of defendant to have presented the check for payment or certification as soon, as with reasonable diligence, it could, and that for any damages arising from the delay in presentation it was liable. *First Nat. Bank of M. v. Fourth N. Bank of N. Y.*, 77 N. Y. 320.

**1179.** It appeared that the account of C. P. & Co., at the bank, upon which the check was drawn, was largely overdrawn on the day when the check was received by defendant, but it appeared that the bank had been in the habit of allowing them to overdraw during any day, they depositing collaterals or making the account good when made up the next day, and that the bank paid all checks down to the failure of C. P. & Co., and among them checks drawn after the one given to defendant. *Held*, that the facts justified the conclusion that the check in question would have been paid had it been promptly presented. *First Nat. Bank of M. v. Fourth N. Bank of N. Y.*, 77 N. Y. 320.

**1180.** It was alleged in the complaint that the draft could be collected from the drawer; plaintiff recovered as damages, the full amount of the draft. *Held*, error; that defendant was only liable for the actual or probable damages caused by its negligence; and that, as sufficient was done by it to charge the drawer who was responsible, defendant was only liable for nominal damages. *First Nat. Bank of M. v. Fourth N. Bank of N. Y.*, 77 N. Y. 320.

**1181.** Also, *held*, that in the absence of proof it would be assumed that the common law rule prevailing here also prevails in Pennsylvania, and that under the law of that State the drawer was charged by what was done by defendant. *First Nat. Bank of M. v. Fourth N. Bank of N. Y.*, 77 N. Y. 320.

**1182.** Plaintiffs sent to defendant for collection a promissory note payable at its bank, made by U., one of its customers. The note fell due Sunday, July 4th, 1875. On July 3d, defendant marked the note as paid and sent to plaintiff a draft for the proceeds. U., at that time, had a small balance to his credit, but not sufficient to pay the note. On July 6th, defendant having learned that U. had failed, stopped payment of the draft, and requested plaintiffs to return it, claiming that it had remitted for the note by mistake. Plaintiffs thereupon returned the draft. Defendants, on July 6th, also caused the note to be noted for protest, and mailed.

#### COMITY.

**1183.** In the interpretation of commercial contracts, this court will be largely influenced, and guided, by the law merchant of the United States, and the constructions of that law made by the Supreme Court of the United States. *Chaffraix & Agar v. Price, Hine and Tupper*, 29 La. 176.

## COMMON CARRIERS.

**1184.** A carrier of freight who expressly contracts to deliver goods at a destination beyond the terminus of his own road is answerable for the negligence of any connecting road in the line of transportation. *Newall, et al. v. Smith, et al.*, 49 Rowell, Vt. 255.

**1185.** The duty of a common carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered; or at least landed, and a reasonable opportunity given to the consignee to inspect them. *The Mary Washington*, 1 Abbott, U. S. 1.

**1186.** The general rules require the carrier to notify the consignee of the arrival of the goods. If a carrier relies upon circumstances as excusing this duty, he must prove them. *Ibid.*

**1187.** The fact that after receiving such notice the consignee refuses to take the goods, cannot relieve the carrier from liability for injury sustained by them *before that time*. *Ibid.*

**1188.** A discharge of goods upon the wharf, giving reasonable notice to the consignee, constitutes a delivery. *The Eddy*, 5 Wallace, U. S. 481.

**1189.** Where insurers, to whom the owners have abandoned, take possession, at an intermediate place or port, of goods damaged during a voyage by the fault of the carrier, and then sell them, they cannot hold the carrier liable on his engagement to deliver at the end of the voyage in good order and condition. *Propeller Mohawk*, 9 Wallace, U. S. 153.

**1190.** Insurers, so accepting at the intermediate port, are liable for freight *pro rata itineris* on the goods. *Ibid.*

## COMMUNITY OF PROPERTY.

**1191.** Property purchased during marriage, whether in the name of the husband or the wife, becomes community property. *Succession of Carmelite Planchet*, 29 La. 520.

**1192.** After the dissolution of the community, the husband, as its former head, has no power to sell, and can convey title to no greater part of the community property than his undivided half-interest in it. *W. W. Bennett v. J. W. Fuller*, 29 La. 663.

## COMPOSITION.

**1193.** Where a party induced a creditor to sign a composition agreement, whereby he accepted one-half of his claim in full, upon the representation of his debtor that no person had received any other thing, etc., the fact that the debtor had given his note for \$500 to induce another creditor to sign the same agreement, which note, upon suit thereon, was adjudged void, is not sufficient to avoid the contract of composition, as it worked no injury to the creditor. *Bartlett, et al. v. Blaine*, 83 Ill. 25.



**1194.** A statute which imposes upon the stockholders of a corporation a personal liability for the corporate debts must be construed strictly ; it is in derogation of the common law, and cannot be extended beyond its literal terms. *Chase v. Lord*, 77 N. Y. 1.

**1195.** In law there is not objection to an agreement on the one side to pay, and on the other to accept, a sum of money less than that claimed by the creditor in satisfaction of a disputed balance, and when the debtor pays, the original debt is discharged. *McCall v. Nave* 52, Miss. 494.

**1196.** Where, in an action on an original indebtedness, defendant sets up and proves a compromise agreement and tender of performance, the tender defeats the action, although not kept good, and plaintiff is not entitled to recover the percentage agreed to be paid by the compromise agreement. See *C. N. Bank v. Kohner*, 85 N. Y. 189.

**1197.** K., defendant's intestate, being indebted to plaintiff and to two other banks, proposed a compromise, by paying or securing a percentage, which one or both of the other banks agreed to accept if plaintiff would. K. proposed to plaintiff's cashier to secure the specified percentage on its claim by a note with G. as indorser. The cashier thereupon, after consultation with plaintiff's president, and at the request of K.'s agent, wrote to one of the other banks, using paper with the bank heading and signing as cashier, to the effect that plaintiff proposed to take K.'s note, indorsed by G., for the percentage, and to discharge K. in full on payment thereof. Soon after writing, the cashier informed the president and they concluded not to compromise. When, therefore, the indorsed note was tendered, the cashier refused to accept it and repudiated the agreement ; before this was made known to K. he had settled with the other banks on the terms proposed, and had been discharged. It did not appear that he owed any other debts. K. afterward tendered a certified check for the amount of the compromise. The president and cashier were the active managers of plaintiff's bank. The compromise was not repudiated on the ground of want of authority of the cashier, and no proof was given that he acted without authority. Compromises were of common occurrence in said bank. In an action upon the original indebtedness, *held*, that the authority of the cashier to act was, under the circumstances, to be presumed ; that the agreement made was a valid composition agreement, and after performance by the other creditors it was too late for plaintiff to recede. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

**1198.** It seems, that had there been proof that the cashier exceeded his authority the question would have been different. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

**1199.** It is not essential that a compromise agreement should be in writing ; each creditor may make a separate parol agreement for the purpose of carrying the compromise into effect, and after the agreement is once made no creditor can withdraw without the consent of the debtor. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

**1200.** The note and certified check after tender and refusal were destroyed. *Held*, that plaintiff having refused to accept performance could not allege non-performance ; that the tender was sufficient to defeat a suit on the original indebtedness, and, after refusal, plaintiff could only put K. in default by demanding the indorsed note as agreed,

or the percentage in money. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

**1201.** It seems that had a suit been commenced on the composition agreement, a claim that the tender should have been kept good would have been a good answer to a defence based upon the tender. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

**1202.** Also held, that plaintiff was not entitled to recover the percentage of its claim so agreed upon, as the action was based solely upon the original indebtedness. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

**1203.** One who seeks to rescind a compromise of a disputed claim on the ground of fraud must promptly, on the discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of it, if of any value; the tender must be without qualifications or conditions. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75.

**1204.** In an action at law upon the original claim, plaintiff must show that he rescinded the fraudulent compromise prior to the commencement of the action; if no rescission is shown a final determination by the court that plaintiff was entitled to more than the sum paid is no answer to the objection. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75.

**1205.** A creditor, who in executing a composition agreement, has been guilty of fraud in respect to the other compounding creditors, by secretly stipulating for a preference to himself, may not avoid the agreement, because of a similar fraud practiced upon him. *White v. Kuntz*, 107 N. Y. 518.

**1206.** The composition agreement is only void as to the innocent creditors executing it. *Ibid.*

**1207.** It seems an innocent creditor upon repudiating the composition agreement, is restored to the right to enforce his original claim. *Ibid.*

**1208.** It seems that the rule is different where the compromise was of an undisputed claim. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75.

**1209.** It seems also that an equitable action to rescind may be brought without such restoration, the plaintiff offering, in his complaint, to restore, if not entitled to retain what he has received. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75.

**1210.** It seems also that the party may retain what he has received and sue to recover damages for the fraud. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75.

**1211.** Plaintiff having a claim against defendant, the C. C. N. Bank, for certain U. S. bonds loaned to it, which the bank claimed to have returned, the parties entered into a compromise by which the bank agreed to, and did, pay to plaintiff \$25,000 in full satisfaction of the claim. In an action upon the original claim, defendant set up the compromise as a defence; also a return of the bonds. Plaintiff thereupon proved that the compromise was induced by fraud. It appeared that the fraud was discovered prior to the commencement of the action. At the close of the evidence on the trial, and after defendant had taken the objection that plaintiff had not returned or offered to return the money paid, he paid into court the amount thereof, with interest, with a statement that the deposit was made upon the conditions that it was to be retained until final judgment, and to be restored



to plaintiff unless the judgment determined that the bank was entitled to it, in which case it should be awarded to the bank. *Held*, that the tender was insufficient; and that plaintiff was not entitled to recover against the bank. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75.

**1212.** Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar, by means of the false and fraudulent representations made to him by the debtor, that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representations, maintain an action against the debtor to recover the damages sustained by reason thereof. As in such an action the damages sustained by the plaintiff depend upon the ability of the debtor to pay more than a moiety of his debts, it is competent to ask witnesses for the defence whether the defendant held property or assets sufficient to pay over fifty cents on the dollar of his liabilities. *Whitside v. Hyman*, 17 N. Y. Sup. Ct. Reps. 218.

**1213.** When an offence is of such a nature that the person injured may obtain either a civil or a criminal remedy, there is nothing unlawful in a compromise of criminal proceedings taken against the offender. *Fisher v. Apollinaris Company*, 32 L. T. N. S. 628; 23 W. R. 460; 44 L. J. Ch. 300; 10 L. R. Ch. 297.

**1214.** The doctrine that where a debtor himself, or a near relative, out of compassion for him, pays money exacted by a creditor as a condition of his signing a composition, he may be regarded as having paid under duress, and is not equally criminal with the creditor, and so that he may recover it back, if sound (as to which *quoere*), cannot be invoked in favor of one remotely related by marriage to the debtor; it can only be asserted in favor of the debtor himself, and the wife, husband or near relative of the blood of the debtor. *Solinger v. Earle*, 82 N. Y. 393.

**1215.** Where a note is given in compromise and settlement of a claim in suit, in the absence of evidence of duress, or that fraud was practiced in bringing about the compromise, or that the plaintiff knew that the claim was groundless or fictitious, it is no defence to an action upon the note, that there was a good and meritorious defence to the original claim. *Feeter v. Weber*, 78 N. Y. 334.

**1216.** R. holding a promissory note, of which P. was the maker, and L. the indorser, signed a composition deed, whereby the creditors of P. released all claims against him, the deed to be null and void unless signed by all his creditors, and wrote after his name the words, "provided this does not release the indorsers in any manner." In an action against P. by another creditor, who had signed the deed, L.'s name did not appear among the signers of the deed; but it was agreed that if the signing by R. did not release the indorser, then all the creditors had signed. *Held*—The condition annexed by R. to his signature of the deed of composition was equivalent to a reservation of his rights against Lochman as indorser of the note held by R., and did not prevent his execution of the deed from operating as a release of all his rights against P., the maker of that note, although it could not affect any right of L. against P. *Sohier v. Loring*, 6 Cush. 537; *Tobey v. Ellis*, 114 Mass. 120. But the report expressly states that if this execution of the deed by R. did not release the indorser, all the

creditors of P. had signed the composition deed—which, as L.'s name does not appear among the signers of that deed.

**1217.** The taking, by a creditor, of the debtor's note for an existing indebtedness does not merge or extinguish the indebtedness; the note is simply evidence of the debt, and its operation is only to extend the time of payment. *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

**1218.** When default is made in payment, the creditor may sue upon the original demand and bring the note into court to be delivered up on trial. *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

**1219.** And so, successive renewal notes are simply extensions from date to date of the time of payment. *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

**1220.** This rule is not changed by the facts that the first of a series of notes so given was indorsed and procured to be discounted by the creditor, and the succeeding ones were each discounted to raise money to take up the preceding one. No note in the series is a payment of the preceding one, unless there has been a discharge of the creditor as indorser, or unless by the transaction he has obtained a claim against another party. *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

**1221.** Plaintiff, who was a brother-in-law of N., of the firm of N. & Co., to induce the defendants, who were creditors of that firm, to unite with the other creditors in a composition of its debts, secretly agreed to and did give them his promissory note for a portion of their debt beyond the amount to be paid by the composition agreement. Defendants transferred the note before due to a *bona fide* holder, and plaintiff was compelled to pay. *Held*, that the agreement was a fraud upon the other creditors; that it was not divested of its fraudulent character by the fact that it was made, not by the debtor, but by a third person; and that an action was not maintainable to recover back the amount so paid. *Solinger v. Earle*, 82 N. Y. 393.

**1222.** Where the drawer of a check has no funds at the time in the bank to meet it, the check is due immediately without presentment and demand, and the statute of limitations begins to run from its date. *Brush v. Barrett*, 82 N. Y. 400.

**1223.** Where, therefore, the holder of the check delays for six years to enforce his claim it is barred by the statute. *Brush v. Barrett*, 82 N. Y. 400.

### CONFEDERATE CURRENCY.

**1224.** A co-surety, who discharged a judgment by paying it in Confederate money, can maintain an action for contribution against the other surety. The value of the Confederate money, at the payment, with interest, was the amount which such payment would entitle plaintiff to recover; not the amount of the judgment discharged. *Edmonds v. Sheahan*, 47 Texas, 443.

**1225.** The fact that a payment of a note was in Confederate States Treasury notes, did not prevent it from being a valid payment when made. *Long v. Walker*, 47 Texas, 173.

**1226.** A sale of property, for cash, was made in Monroe County,



with reference to Confederate States Treasury notes as a standard of value, on December 26th, 1862. The balance of the purchase money actually paid must be reduced to its true gold value as to that date; but in ascertaining this value, the price at which gold was then selling in Confederate currency in Richmond or elsewhere in the Confederate States is not to be regarded as fixing the relative value of gold and Confederate notes. The value of Confederate notes then, as compared with gold, should be ascertained by the then average apparent appreciation in value, when sold for Confederate currency, of all kinds of property, real and personal, in Monroe County, as compared with the value of such property just before the war commenced, when gold was the currency of the country. *Bierne v. Brown's Adm'r*, 10 West Virginia, 748.

**1227.** A decree, or a judgment, when rendered upon a contract payable in Confederate Treasury notes, should be for a sum equal to the value of those notes, not in the gold coin, but in the legal-tender currency of the United States, at the time and the place where they were payable. Such notes can in no proper sense be regarded as commodities merely. *Bissell v. Heyward*, 96 U. S. 580.

### CONFLICT OF LAWS.

**1228.** The *lex loci* governs in determining the validity, and in the construction of contracts, but in respect to the time, mode and extent of the remedy the *lex fori* governs. Statutes of limitation fixing the time within which an action may be brought, laws providing for a set-off, and statutes exempting property from levy and sale for debt, or exempting wages from garnishment, relate to the remedy only, and such laws of a State where a debt is contracted cannot be invoked where the remedy is sought to be enforced in a different State. *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365.

**1229.** The law of this State prohibiting an individual from doing business under a *firm* name, does not affect a person residing in another State. *Succession of Bofenschen*, 29 La. 711.

**1230.** The decisions of the court of one State upon a question of commercial law are not obligatory upon the courts of other States; and when such decisions are in conflict with the principles of the common law concurred in by the courts of this State, they will not control even as to contracts made here but to be performed in the State where such decisions were made. *Faulkner v. Hart*, 82 N. Y. 413.

**1231.** It seems, however, that when the question arises under a State statute the construction placed upon the statute by the courts of the State, will control. *Faulkner v. Hart*, 82 N. Y. 413.

**1232.** An assignment by virtue of or under a foreign law does not operate upon a debt, or rights of action as against a person in this State. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

**1233.** Plaintiff, a corporation organized under the laws of Michigan, and doing business in that State, being the owners of a note made by I. and D., which, with other debts, was secured by a mortgage upon a propeller, before the maturity of the note, transferred it and the

mortgage to a Detroit bank. After the maturity of the note I. went to Detroit and applied to the bank for an extension of time, and it was agreed between him and the bank that provided the latter could get the consent of the indorsers of said note it "would extend the time of payment so that the amount could be paid in installments not exceeding for any part a period of three months." I. to give new notes for the amount, indorsed to the satisfaction of the bank, to be held as further and additional security, and to pay interest at the rate of ten per cent. per annum. The bank procured the assent of the indorsers and sent one M. with the note and mortgage to Buffalo with directions to foreclose the mortgage unless the note was paid or said arrangement was carried out. I. thereupon procured and delivered to M. new notes made by him in pursuance of the agreement for the amount of the note and interest. Two of said new notes were dated at Buffalo, August 7th, 1875, payable with seven per cent. interest to the order of defendant, and by him indorsed for the accommodation of I., the latter also paid to M. a sum equal to the difference in interest between that called for by the notes and that agreed to be paid, from the time of maturity of the old note until the new notes by their terms became due. M. delivered the new notes and the money to the bank at Detroit, which accepted the same and thereupon extended the time of payment as agreed. In an action upon the notes one of the defences was usury. *Held*, that the contract for forbearance was a Michigan one, and as it was valid under the laws of that State was valid and enforceable here. *West Tr. & Coal Co. v. Kliderhouse*, 87 N. Y. 430.

### CONSIDERATION.

**1234.** The waiver of a legal or equitable right is a sufficient consideration to support a promise. Where there is any consideration, the law will not inquire into its adequacy. *Buckner v. McIlroy*, 31 Ark. 631.

**1235.** Debt barred by statute sufficient consideration for new promise. *Gammell v. Parramore*, 58 Ga. 54.

**1236.** An agreement to forbear proceedings is a valid consideration for a promise, though the claim be doubtful. *Matthews v. Morris*, 31 Ark. 222.

**1237.** Where a promissory note is given for a draft assigned by the payee of the note to the maker, and an agreement executed at the same time, that, in the event the maker of the note could not "collect or realize" on the draft, he was to be released from the payment of the note, no recovery can be had on the note where the maker has been unable to realize anything on the draft. And the fact that the assignee of such draft becomes indebted to the drawer, does not change the rule or show that the holder has realized anything on it, when no suit has been brought by the drawer on his demand to enable the holder to set off the draft against the same. *Hall, et al. v. Henderson*, 84 Ill. 611.

**1238.** Although the consideration for a promise or undertaking



may be expressed in a separate writing of the parties, still, parol evidence may be received to show that the real consideration was different, where the defence goes to the consideration. Where an action is brought upon a written contract, resort may be had to parol evidence for the purpose of impeaching the consideration of the agreement. *Wolf v. Fletemeyer*, 83 Ill. 418.

**1239.** The giving of his individual promissory note, by one of the members of a copartnership, after its dissolution, for a portion of a copartnership debt, is a good consideration for an agreement on the part of the creditor to release and discharge the maker from liability for the debt. *Ludington v. Bell*, 77 N. Y. 138.

## CONSTITUTIONAL LAW.

**1240.** The Legislature in chartering a corporation has the power to provide that it may lose its corporate existence, without the intervention of the courts, by any omission of duty or violation of its charter, or default as to limitations imposed. *B'klyn St. Trans. Co. v. City of B'klyn*, 78 N. Y. 524.

## CONSTRUCTION OF STATUTES.

**1241.** The practical construction put upon a statute by public officers whose duty it is to obey it is not controlling upon the courts. *In re Manhat. Svcs. Inst'n*, 82 N. Y. 142.

## CONTRACT.

**1242.** Contract of sale induced in part by a desire on behalf of both vendor and purchaser to cause certain promissory notes of the vendor's to be paid, on which he has forged the names of persons as indorsers, and thereby to prevent a prosecution for the forgery, is illegal and void, and leaves the property subject to attachment by the vendor's creditors. *Laing v. McCall*, 50 Vt. 657.

**1243.** A., who had bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Subsequently, B. bought C.'s business and delivered ice to A., without notifying him of his purchase until after the delivery and consumption of the ice. Held, that B. could not maintain an action for the price of the ice against A. *Boston Ice Co. v. Potter*, 123 Mass. 28.

**1244.** A contract simply giving a right to take ore from a mine, no interest or estate being granted, merely confers a license. *Silsby v. Trotter*, 29 N. J. 228.

**1245.** Courts cannot protect the rash against the consequences of imprudent contracts, if they enter into them voluntarily, and not

through fraud or artifice. A deed made by a person while in a state of intoxication will be set aside if advantage has been taken of his situation, or his drunkenness was produced by the act or connivance of the person to be benefited by the deed. *O'Conner v. Rempt*, 29 N. J. 156.

**1246.** B. executed his promissory note to H. & D., payable January 15th, 1876, in the usual form, with the addition of the following words: The above note is given upon, and for the sole consideration that the said Hawley & Dodd have agreed and promised that upon the payment of the said note at maturity (time being of the essence of the contract), they will sell and transfer to the undersigned, Bingham, the planing machine which they have this day entrusted to him. *Held*, that the promise of B. was not dependent upon the promise of H. & D. to sell and transfer the machine as a condition precedent; but that it was an independent promise to pay. *Hawley v. Bingham*, 6 Oregon, 76.

**1247.** It seems that the rule in this State, that a common carrier may, by express stipulation, exempt himself from liability for negligence, will not be considered as overthrown or affected by the decision of the United States Supreme Court to the contrary. (*Lockwood v. R. R. Co.*, 17 Wal. 357.) *Maynard v. S. B. & N. Y. R. R.*, 71 N. Y. 180.

**1248.** If a written agreement which is intended to be signed by several persons or parties thereto is not signed by all, it is not completely executed and does not bind any of the parties. *Barber v. Burrows*, 51 Cal. 404.

**1249.** An agreement will not be adjudged illegal when it is capable of a construction which will uphold and make it valid. *Lorrillard v. Clyde*, 86 N. Y. 384.

**1250.** When a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted. *Hobbs v. McLean*, 117 U. S. 567.

**1251.** One of the parties to a contract cannot rescind unless he restores or offers to restore the other party to his original position, he cannot retain in himself or withhold through another any fruits of the contract. *Francis v. N. Y. & B. El. R. R. Co.*, 108 N. Y. 93.

**1252.** Where there is uncertainty or doubt as to the meaning of words or phrases used in a contract, in seeking for the intent of the parties as evidenced by the words used, the fact that a construction contended for would make the contract unreasonable and place one of the parties entirely at the mercy of the other, may properly be taken into consideration. *Russell v. Allerton*, 108 N. Y. 288.

**1253.** Where a party by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods. *Donaldson, Assignee v. Farwell, et al.*, (3 Otto) U. S. Rpts. 93, 631.

**1254.** The defeasible title of the vendee to the goods so acquired vests in his assignee in bankruptcy, and is subject to be determined by the prompt disaffirmance of the contract by the vendor. *Ibid*.

**1255.** What one party to a contract understands or believes is not to govern its construction unless such understanding or belief was in-



duced by the conduct or declarations of the other party. *Bank v. Kennedy*, 17 Wallace, U. S. 19; also *Bailey v. Railroad Company*, 17 Wallace, U. S. 97.

1256. The provisions of the constitution and by-laws of the New York Exchange are obligatory upon its members as a contract. *Weston v. Ives*, 97 N. Y. 222. It seems clear that a lunatic is liable upon executed contract for articles suitable to his degree, furnished by a person who did not know of his lunacy, and practiced no imposition upon him. *Williams v. Wentworth*, 5 Beav. Eng. 325; also, *Selby v. Jackson*, 6 Beav. Eng. 192.

1257. Where A. advanced money on mortgage to B., a lunatic, but did not know B.'s state, and took no advantage of him, he was held to a decree of foreclosure. *Campbell v. Hooper*, 24 L. J. (Ch.) Eng. 644.

1258. It seems equally clear that he is not liable when the other contracting party has taken advantage of his lunacy; indeed, that was the decision in *Levey v. Baker* reported on *Brown v. Jodrell*, M. & M. Eng. 106.

1259. A positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence, or mistake, is an obligation in morals, and is a sufficient consideration for a subsequent express promise. *Bentley, et al., executors v. Lamb*, 112 Penn. 480.

1260. A verbal promise by an executor, either with or without assets, to a legatee to pay a legacy, since the Act of April 26th, 1855. P. L. 308, imposes no personal liability upon him, and no right of action against him can therefore be maintained. *Smith v. Carroll*, 112 Penn. 390.

1261. Contracts, when binding:—either party may withdraw and refuse to complete a contract any time before an agreement is actually entered into. *Eliason v. Henshaw*, 4 Wheat. 228.

1262. A party making an offer may withdraw it any time before the other party has accepted it. *Payne v. Cave*, 3 T. R. 148; *Rutledge v. Grant*, 4 Bing. 653.

1263. But where the other party accepts before he is notified of the withdrawal of the contract, it is binding. *Cook v. Oxley*, 3 T. R. 268, 653; in Maryland, *Wheat v. Cross*, 31 Md. 99; *Stockham v. Stockham*, 32 Md. 196; in Alabama, *Falls v. Gaither*, 9 Post. (Ala.) 605; in New Hampshire, *Abbott v. Shepard*, 48 N. H. 14.

1264. The unsupported oath of one of the parties to an instrument is not sufficient to defeat or change it when opposed by the oath of the other party. *Jones v. Backus, et al.*, 114 Penn. 120.

1265. Parol evidence is admissible to show a verbal, contemporaneous agreement which induced the execution of a written obligation, though it may vary or change the terms of the written contract. *Cullmans, et al. v. Lindsay, et al.*, 114 Penn. 166.

1266. A written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it. *Ibid.* See *Juniata Building Ass. v. Hetzel*, 7 Ont. 507; also, *Walker v. France*, (2 American) 112 Penn. 203.

1267. Where upon agreement between them, A. and B. have placed in the hands of C. each a certain sum, and C. was to contribute a like sum, the fund created to be wholly for the benefit of D., then in ignorance of the arrangement, and the control of it entirely relinquished by the contributors, D. may sustain an action in his own name against C. to enforce payment of the fund to him. *Hostetter v. Hollinger*, 117 Penn. 606.

1268. To reform a written contract on the ground of fraud, evidence that it was fraudulently misread to the defendant when he signed it, by a third person to whom it was entrusted merely for the purpose of delivery, is insufficient. *Sylvius v. Kosek*, 117 Penn. 67.

1269. Every contract must be mutual as to remedy and obligation, and will not be enforced against one who has not the power to enforce it in his own behalf. *Ryan v. Dunphy*, 4 Mont. 342.

1270. An agreement by one of three parties to the other two, all three of whom were equally obligated to a fourth party, to procure the payment of their common indebtedness from other resources of an insolvent company; for which they were personal security, is without any valid consideration and void. *Kinna & Ming v. Woolfolk*, 4 Mont. 318.

1271. If no time is fixed for payment of money acknowledged to be owing, it is due at once, or at any time the payee choose to demand it. *Sweetland v. Barrett*, 4 Mont. 217.

1272. Meaning of the words, "*Value received*."—In a guaranty written on the back of a promissory note the words *value received* impart a consideration which is *prima facie* sufficient to support the contract. Semble, that a guaranty is an original undertaking upon which the guarantor is liable in the absence of proof that the maker of the note is insolvent or that diligence was used to collect from him. *Martin v. The Hazard Powder Co.*, 2 Colorado, 596.

1273. When one party to a contract violates it, he cannot avail himself of its provisions against the other party, and such other party has a right to consider the contract rescinded. *Scheland v. Erpelding*, 6 Oregon, 258.

1274. Where E. delivered a note of H. to his son, with instructions to go to H. and buy a mule, and enter the price of the mule on the note as a credit, and the son entered into a bargain with R. to buy a horse for \$125, with the understanding that if R. did not collect the amount out of the note by a certain time, he was to have his choice to take the horse back or take \$125 for him; *Held*, that the legal effect of the transaction was to place the note with R. as a security for the price of the horse, and the property of the note remained in E. *Earp v. Richardson*, 78 N. C. 277.

1275. Degree of proof to establish. A subsequent contract will not operate to extinguish a former one between the same parties unless it is expressly accepted by them for that purpose. The evidence must be clear and satisfactory that such was intention of the parties. *Watson v. Janion*, 6 Oregon, 137.

1276. A purchaser at an execution sale cannot in equity be excused from consummating his purchase because never having attended such a sale before, and not hearing the terms of the sale, he supposed himself to be buying the entire estate in question, and not the "right,



title, and interest" of the judgment debtor in it. *Upham v. Hamill*, 11 R. I. 565.

1277. Where a commission merchant contracts for the purchase of grain for another, to be delivered at a future time, the principal making an advance on the purchase, which is in the merchant's name, and agrees to keep the margin good up to the time of delivery, the relation of pledger and pledgee will not be created, so as to require a notice of the time and place of a sale on failure to keep up the margins. *Cobett v. Underwood*, 83 Ill. 324.

1278. Memorandum of contract as follows: "I hereby agree to sell J. K. the house and lot situated on L. Street, second lot east of C. Street, on north side of L. Street, for the sum of (\$7,000) seven thousand dollars, and agree to give a satisfactory deed on or before the first day of September next, and hereby acknowledge the receipt of ten dollars on account of above sale." Signed W. E. T., J. K. In an action by W. E. T. against J. K., *Held*, that the memorandum was sufficient to bind J. K. *Thornton v. Kelly*, 11 R. I. 498.

1279. A contract for the sale of wheat in store, to be delivered at a future time, which requires the parties to put up margins as security, and provides that, if either party fails, on notice, to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the contract and market price, without offering to perform on his part, or showing an ability to perform, is illegal and void, as having a pernicious tendency. *Lyon & Co. v. Culbertson, Blair & Co.*, 83 Ill. 33.

1280. All contracts for sale made on 'Change by members of the Board of Trade to another member, with reference to the by-laws and rules of the board, must be construed as if those rules were expressly made a part of the contract; but members of that board may, by contract on 'Change or elsewhere, bind themselves beyond and independent of these rules. Where the sale is made at its rooms, in the absence of proof to the contrary, it will be presumed to have been made with reference to these rules. *Thorne, et al. v. Prentiss*, 83 Ill. 99.

1281. S. residing in Indiana, received from W., a commission merchant of Cincinnati, \$6,000, advanced on account of pork, to be thereafter cut and shipped by S., for sale on commission. In pursuance of the contract, S. shipped by rail a car-load of the pork, consigned to W., at Cincinnati, to whom he also sent an invoice of the shipment, with a letter of advice, stating: "We deliver this load on our indebtedness." The value of the shipment was less than the amount of such indebtedness. The bill of lading was taken by S. in his own name, and was not forwarded to the consignee. *Held*, under these circumstances the delivery of the pork by S. to the carrier was equivalent to a delivery to the consignee, and that after such delivery S. retained no such interest in the pork as could subject to attachment at the suit of a creditor. *Strauss v. Wessel*, 30 Ohio, 211.

1282. In case of a mistake in the drafting of a contract, if the parties subsequently settle upon a basis of the contract as it should have been written, and a promise is made to pay or allow the balance thus found due, such promise will be enforced. A written agreement may be waived, varied or annulled, by a subsequent oral agreement of the parties.

**1283.** In *Goss v. Lord Nugent*, 5 Barn. and Ad. 65, Eng., Lord Denman states the law on this subject thus: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any measure to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement." Approved in *Wiggin v. Godwin*, 63 Me. 389.

**1284.** The agreement by which a creditor, who has bought his debtor's property, stipulates to reconvey it to the debtor on condition that the latter pays a certain price within a certain time, is a valid contract, and if the debtor fails to pay the price, in accordance with the terms of said contract, his right of redemption will be forfeited, and the title of the property will vest absolutely in the purchaser. *Soulie v. Ranson*, 29 La. 161.

**1285.** Contracts made on Sunday in this State are void, not at common law, but because they are in violation of a penal statute of this State. So an action by the payee, against the maker on a promissory note, and answer, alleging the signing and delivery of the same on Sunday to a third person or to a co-maker, and averring it to be therefore void, is sufficient. Such signing and delivery on Sunday carry with it no implied authority to the person to whom it is entrusted, to deliver the same to the payee. Such signing and delivery on Sunday render the instrument void, though then entrusted to another with instructions to deliver it to the payee on a business day. *Davis v. Barger*, 57 Ind. 54.

**1286.** Twelve persons entered into the following obligation under seal: Whereas, P. S. is employed by the Baltimore County Brewing, Malting and Distilling Company, as the manager of said company; and whereas, the said P. S. is employed and authorized to purchase the malt and hops for said brewery; and whereas, each of the directors of said company have agreed to become individually responsible in the sum of twenty-five hundred dollars each for malt and hops which the said manager shall purchase for the use of the said brewery, during the space of one year from the date hereof. Now, therefore, these presents witness, that in consideration that said P. S. will undertake said authority and employment, and that dealers in hops and malt will sell to him upon the faith of this bond, we bind ourselves and each of us, our and each of our heirs, executors and administrators, in the sum of twenty-five hundred dollars each, making in all the sum of thirty thousand dollars, for the payment of hops and malt, which the said P. S. may purchase for the use of said brewery, during the space of one year from the date thereof; and we, and each of us agree and promise, that we will pay such hops and malt bills, in total not exceeding the sum of thirty thousand dollars, or twenty-five hundred dollars each, in the manner and at the time the said P. S. shall agree to pay them. In an action against all of said obligors, it was *Held*, First, That in the construction of said paper, as in the construction of all written instruments, the cardinal rule to be observed, was to ascertain the intention of the parties as expressed on the face of the paper.



Second, That the said instrument construed all together and in all its parts, was a contract by which each of the obligors had bound himself severally for \$2,500 only. *Boyd, et al. v. Kienzle, et al.*, 46 Md. 294.

**1287.** *Equity* can no more enforce a void contract than can a court at law. *Reed v. Reeves, Adm'r*, 13 Bush, Ky. 447.

**1288.** To establish a contract by acceptance of a proposition, it must appear that the one making it was notified of the acceptance. *Goss's Appeal*, 73 Penn. 39.

**1289.** Contract between creditor and principal, or creditor and surety, without the concurrence of co-sureties, whereby the latter are subjected to an increased risk, operates as a discharge of such sureties. The release of one or more sureties without the assent of the co-sureties will operate *at law* to discharge the latter. In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the co-sureties to an increased risk or liability. *Smith, et al. v. State, use of County Commissioners of Baltimore Co.*, 46 Md. 617.

**1290.** Although the parties may be longer than a year in the performance of a contract, still, if that performance may be completed within a year, and such performance is entirely in accordance with the intention and understanding of the parties, such contract is not within the statute, and need not be in writing, in order to maintain an action upon it. Although a cause of action may relate to the subject-matter of a patent right, it is within the jurisdiction of State Courts, if it does not involve the validity of the patent right. *Blakeney v. Goode*, 30 Ohio, 350.

**1291.** On a treaty of marriage, a promissory note was given in consideration of the marriage, which was afterwards solemnized, and an action was subsequently brought by the indorsee against the two joint and several makers of the note,—*Held* (reversing the decision of the Common Pleas), that as the marriage, the consideration for the note, could not be undone, it was not competent to the defendants to avoid the note upon the ground of fraud practiced during the marriage treaty.

**1292.** That when a party exercises his option to rescind for fraud, he must be in a state to rescind—that is, he must be in such a situation as to be able to put the parties into their original state before the contract. *Hogan v. Daniel and Thos. Healy*, Irish Reports, Common Law Series, vol. 11, p. 119.

**1293.** Where a party to a contract, who is entitled to a forfeiture in case of non-performance by the other party of a condition therein, by his own act induces such other party to omit strict performance within the time limited, he cannot exact the forfeiture, if the party in technical default with reasonable diligence thereafter performs or offers to perform. *Leslie v. Knickerbocker Life Ins. Co.*, 18 Sickels, N. Y. 27.

**1294.** A written contract having no latent ambiguity can neither be qualified nor controlled, enlarged nor diminished, by evidence of a contemporaneous parol understanding. Thus where defendant addressed plaintiff by writing signed by him and plaintiff's agent, requesting them to send him a set of patent milk-pans, and saying, "I agree to pay you . . . if satisfied with the pans," it was *Held*, that evidence of an agreement between defendant and said agent as to

manner in which the pans should be tested, entered into at the time the written contract was drawn, and as part of the same agreement, was inadmissible. If one order goods, agreeing to pay if satisfied therewith, he must, in ascertaining whether he is satisfied or not, act honestly, and in accordance with the reasonable expectations of the seller as implied from the contract, its subject-matter and surrounding circumstances. His dissatisfaction must be real and not pretended, to be available as a defence to an action for the contract price. *Daggett, et al. v. Johnson*, 49 Rowell, Vt. 345.

1295. An action for a breach of contract must be brought by the party with whom the contract was made. *Corbett v. Schumacker*, 83 Ill. 403.

1296. Although an action cannot be maintained upon a verbal contract not to be performed within one year, yet when such contract has been fully performed by one party, the other having obtained its benefits, he cannot refuse to pay the reasonable value thereof. T. agreed to work until coming of age, a period of six years or more, for M. Having performed the contract, T. may maintain an action *quantum meruit* for his services. *Towsley v. M.*, New Series, 30 Ohio, 184.

1297. The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out. *Nat. Bank v. Bigler*, 83 N. Y. 51, necessarily implies that the relation between him and P. was such that he was not a creditor of P., and would, if called upon to pay the note as indorser, have any right to recover against P. The deed of composition having been signed by all the creditors of P. is a bar to this action against him. Judgment on the verdict for the defendant. *Richardson v. Pierce*, 119 Mass. 165.

1298. An agreement of creditors "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15th," the contract to take effect "provided all merchandise indebtedness accept the same settlement," is an agreement on the part of a creditor, who has sold the debtor merchandise to compromise the whole claim set against his name, and rests upon sufficient consideration. *Farrington v. Hodgdon*, 119 Mass. 453.

1299. Creditors signed an agreement "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15th," the contract to take effect "provided all merchandise indebtedness accept the same settlement." A., one of the creditors, held three notes of the debtor, two of which he had previously sold, taken back under false representations by the purchaser, and at the time he signed the above agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take the notes back, which was done before December 15th. *Held*, in an action by A. upon the note not sold, that A. not being in possession, or having control of the two notes sold, the debtor was not obliged as to whom to tender the settlement notes. *Held* also, as to the note in suit, that the debtor was not obliged to tender a settlement note of seventy-five per cent. on that note after the transfer of the other two notes, which the debtor had paid to the purchaser. *Held*, also, that evidence



of conversations, tending to show the understanding of parties as to the notes sold, prior to the execution of the agreement, was not admissible to vary the written contract. *Ibid.*

**1300.** The creditors of A. and B. by a composition deed agreed to accept from A. and B. "ten per cent. of the amounts due us, and each of us, from said A. and said A. and B. in full settlement and discharge of our debts against them; said ten per cent. to be paid within thirty days." The plaintiff, one of A.'s creditors, who joined in the composition, held a note and account against him, which were then due. He also held another note, which would not become due until after the expiration of said thirty days, on which A.'s name appeared as indorser. The defendant contends that upon payment of ten per cent. of amounts due, he was entitled to be discharged from all debts, whether due or not. *Held*, whatever might have been the effect of the deed upon debts, the liability for which was fixed, the character and language of the deed does not indicate that it was intended to be a relinquishment of all liabilities, by reason of which the defendant might afterwards, upon the occurrence of certain events, become chargeable as a debtor. While such a contingent demanded, yet it should appear that they had it in view at the time of executing the deed. *Pierce v. Parker*, 4 Met. 80, 89. Here everything points to the opposite conclusion. Before it could be determined whether the defendant would become liable to pay this note, the composition deed would by its terms have been fully executed. There were two claims to which it strictly applied; and the subsequent conduct of the parties, who made no provision for any dividend upon this, tends to show that it was not understood upon either side that this claim was released. *Hamblen v. Rartigan*, 119 Mass. 153.

**1301.** A contract can only be rescinded by the acts or assent of all the parties. A party, claiming to have rescinded a contract, cannot excuse himself for not returning a promissory note, by showing that it is worthless by reason of its maker's insolvency. Where a party had produced and surrendered to a referee at the trial certain notes, but had neglected seasonably to return other notes, and the object was insisted upon, it was held that by leave of court he might resume the notes so surrendered. *Spencer v. St. Clair*, 57 Hall, N. H. p. 9; *Cook v. Gilman*, 34 N. H. 556; *Evans v. Gale*, 21 N. H. 240; *Winkley v. Foye*, 28 N. H. 513.

**1302.** I. sold stock to T., and agreed that when T. should desire it, he would take it back and repay the price. *Held*, that upon tender of the stock T. might recover the price with interest. *Laubach v. Laubach*, 73 Penn. 389.

**1303.** On a refusal by a vendee to accept goods sold him, the measure of damages is the difference between the contract and the market price at the time of refusal. Where the contract is that the vendee may rescind the contract, the vendor to pay back the price, or the contract is rescinded by the vendee by reason of inherent vice; the measure of damages is the price paid and interest. *Laubach v. Laubach*, 73 Penn. 389.

**1304.** A. directs B. to give credit on the application of C. for such goods as the latter may order, and charge to him, as it is immaterial whether A. had any thing further to do with ordering the specific

goods, or whether C. is the agent of A. If B., relying on the general direction of A. to deliver goods to C., furnishes goods to C. but gives credit to A., A. is liable whether C. is A.'s agent or not. *Jackson, et al. v. Dodge*, 4 Mo. Ct. Appeals (St. Louis) 567.

**1305.** As a general rule, an action on a contract must be brought in the name of the party having the legal interest therein. A third party may maintain an action in his own name upon a contract made expressly for his benefit where his release would be a sufficient discharge to the promissor, but not where it would leave the promisor liable to an action by the other contracting party. *Kountz v. Holthouse*, 85 Penn. St. 235.

**1306.** When the plaintiff in an action on a promissory note avers, in his replication, that the note was given to bind a parol contract for the conveyance of land, to be paid if defendant refused to carry out the bargain, and to be void if the contract was carried out, and that defendant had refused to carry out his part of the contract, it is error to render judgment for defendant on the pleadings. There is nothing illegal, immoral, or unconscionable in such a contract. *Schencko v. Meier*, 4 Mo. Ct. Appeals (St. Louis) 566.

**1307.** A contract for the delivery of property being entire, the promisee is not bound to receive a part, though the parties may by consent, sever the contract. In an action upon two due bills payable in specific property, one requiring demand, the other not, and the parties having severed the contract by delivery and receiving part of the property from time to time, *held*, that the plaintiff, to maintain his action, must show a demand and refusal as to the first due bill, and as to the residue remaining undelivered on the second. *Widner v. Walsh*, 3 Colo. 548.

**1308.** When one person represents that he owes to the debtor of another a debt of equal amount, substitutes himself in place of the debtor by parol agreement with the creditor, fixes a time for payment, and thus induces the creditor to discharge the debtor and trust exclusively to him, his undertaking to pay is not collateral, but original, and performance may be enforced whether he ever in fact owed any thing to the debtor in whose stead he agreed to be bound or not. *Edenfield v. Canady*, 60 Ga. 456.

**1309.** It is not a good defence to a promise in writing under seal, to pay a sum of money, for value received, that it was voluntary. The statutes concerning evidence (Rev., p. 380, § 16) which permit a defendant to plead and set up fraud in the consideration, and (Rev., p. 387, § 52) to show want of sufficient consideration as a defence to a sealed instrument established new rules of evidence, but were not intended to abolish all distinctions between simple contracts and specialties. *Aller v. Aller*, 40 N. J. Law Reports, 447.

**1310.** A planter who has agreed to consign, and pay commission on his entire crop to his factors, in consideration of certain promises and stipulations in his favor made by the factors, is released from his obligation to consign and pay such commission on whatever balance of his crop he may have on hand, when the factors shall fail and refuse to comply with their stipulations; more particularly when the failure of the factors to perform their part of the contract, disables the planter



from performing his part of it. *Nalle & Cammack v. A. L. D. Conrad, et al.*, 30 La. 503.

1311. Defendant signed a written agreement without reading it, and did not contain the contract as in fact made, is no ground for the introduction of parol evidence to vary its terms, etc. It is not the duty of courts to relieve parties from the results of their gross negligence. *Bostwick v. Duncan, Johnston & Co.*, 60 Ga. 383.

1312. A written contract containing terms not presenting a case of latent ambiguity, are not to be varied by extrinsic and parol evidence, the expression "payable as convenient" cannot reasonably be understood as extended to excuse the defendants in any event, from making any payment at all. It can only mean that some indulgence as to the length of credit was to be allowed to the debtors. The service requested in the contract has been performed and the price agreed upon, as the compensation for that service is yet unpaid, though due and payable. *Black v. Bachelder, et al.*, 120 Mass. 171.

1313. When it is attempted to be shown by parol evidence that the operation of a contract was to be limited to a particular time, the evidence thereof must be positive and clear. *Shepler v. Scott*, 85 Penn. 329.

1314. Written contracts are to be interpreted by the court, and their ambiguities explained by surrounding facts, not by the interpretation of witnesses. *Home Life Ins. Co. v. Potter, et al.*, 4 Mo. Ct. Appeals (St. Louis) 594.

1315. Contract signed by one party only, is accepted by the other party, it becomes binding upon both parties, the same as if signed by both. *Brandon Mfg. Co. v. Morse*, 48 Vt. 322.

1316. Contract in writing for the sale and delivery of a certain quantity of wood at a stipulated price per cord, did not, in terms, fix the time of payment. *Held*, that the law fixed the time as on demand after delivery, and that the fact that the purchaser made voluntary payments to the vendor before delivery, did not vary the contract. *Ibid.*

1317. An assignee of a lease without warranty cannot set up a defect of title in defence to an action upon a note given in consideration of the assignment. In such case the assignee occupies the same position as a purchaser of real estate under a deed of quit claim. *Sanborn v. Cree*, 3 Colo. 149.

1318. In an action on a contract for the transfer to the plaintiff, by the defendant, of a certain promissory note, an instruction to the jury, that, if such contract was made for a valuable consideration, the transfer should "be made by indorsement, unless a different agreement is made by the parties," and that the burden of proof is upon the defendant to establish the latter agreement, is correct. *Wade v. Guppinger*, 60 Ind. 376.

1319. Where two parties agree as to what shall be done in case one party fails to perform his part of the contract, and upon such failure the thing agreed upon is done, no action lies for such failure, the contract being discharged by the fulfilment of its terms. *Reel v. Ewing*, 4 Mo. Ct. Appeals (St. Louis) 569.

1320. The rule which forbids the varying of written instruments by parol proof applies only to the parties to the writing. *Whitney v. Cowan*, 55 Miss. 626.

**1321.** In the absence of a stipulation as to the time when an act is contracted to be done, the law allows a reasonable time for its performance. What is reasonable time depends upon the nature and character of the thing to be done, the circumstances of the case, and the difficulties attending its accomplishment. As an abstract question, what is reasonable time may be one of law; but unless the facts are admitted, its determination becomes a mixed question of law and fact. In an action to rescind a contract, a proffer to perform, made in defence, should show an ability to comply, or a reasonable prospect of being able to do so. *Hart v. Bullion*, 48 Texas, 278.

**1322.** Where one brings an action to recover compensation for procuring a sale of real estate under a special contract, it is not necessary to show that he had a license to act as a real estate broker. *Shepler v. Scott*, 85 Penn. St. 329.

**1323.** A party may not stand by and see work in the erection of a building progress to completion, and then for the first time object that the work was not done in strict accordance to the plan, refuse payment and charge the builder with the cost of reconstruction. The builder is in such case, entitled to recover what the work is reasonably worth. When work is done under a contract, the terms of the contract should settle the amount to be paid, unless it is shown that in consequence of variations from the plan, the compensation agreed upon should be diminished, and the proper measure of damages in such case is the diminution of the value of the building resulting from the variation. *Schoefer, et al. v. Gildea, et al.*, 3 Colo. 15.

**1324.** To introduce a new term into a written contract, the evidence of the agreement of the parties to do so must be clear and distinct, and that the contract was executed upon the faith of such collateral agreement. *Railroad Co. v. Hodgins*, 85 Penn. St. 501.

**1325.** When the payment of the purchase money is a condition precedent to the delivery of a deed of conveyance, the refusal to pay the whole, or any balance due, leaves the vendor at liberty to rescind the contract. Where the vendor receives part of the purchase money, he must, before seeking relief in a court of equity against the vendee, return, or offer to return, the amount received, with interest. Where A. held title to realty in trust for B., and at B.'s request conveyed to C., the payment of the purchase money being a condition precedent to the delivery of the deed, and the deed having been delivered, without compliance with that condition, *held*, that on refusal of payment, B. had his election either to pursue his remedy at law against C., and thus affirm the contract, or to rescind the contract, and seek equitable relief. *Hamil v. Thompson, et al.*, 3 Colo. 518.

**1326.** A contract to answer for the debt of another must not only be in writing, but based upon a sufficient consideration. *Langford v. Freeman*, 60 Ind. 46.

**1327.** That in consideration of supplies furnished, defendant agreed that crop should belong to claimants; that he would deliver it to them by October 15th, thereafter, or, in lieu thereof, pay them \$500; that, on failure so to do, he should be considered liable for breach of trust, and they could either take possession of the crop or sue for that amount, with twelve per cent. interest, etc.; that, in order to secure the fulfilment of the contract, defendant conveyed and de-



livered to claimants certain personalty, which was, however, to remain in his possession; that defendant waived homestead and exemption rights, was a mortgage, and did not convey a title. *Lee v. Clark, Rosser & Co.*, 60 Ga. 639.

**1328.** Contract founded upon mutual and concurrent promises, afford sufficient legal consideration for the support of each other. *Missisquoi Bank v. Sabin*, 48 Vt. 239.

**1329.** The defendant subscribed for shares in a patent right, to be held by him without payment therefor, otherwise than by inducing others to subscribe for shares and give their notes therefor for greatly more than the value of the shares; the notes afterwards came into his hands by purchase, and were by him negotiated for money, and paid by the makers. *Held*, that these facts would not entitle the makers to maintain an action against him for money had and received. *Lane v. Smith*, 68 Me. 178.

**1330.** The maxim, that "the express mention of one thing implies the exclusion of another," is ordinarily used to control, limit, or restrain the otherwise implied effect of an instrument, and not to "annex incidents to written contracts in matters with respect to which they are silent." *Morrow v. Morgan*, 48 Texas, 304.

**1331.** If a creditor receives a partial payment before any breach of contract, and agrees to look to another source than the promisor for payment, such new agreement is binding, and the original contract is abandoned or waived; but if such agreement is made only to induce performance, and prevent a breach of the original contract, it is without consideration, and cannot be supported. When a valid contract subsists between the parties, it is competent for them, at any time before its breach, to waive, annul or dissolve the agreement, or to change or modify its terms, and the mutual agreement of the parties is a sufficient consideration. *Burkham v. Mastin*, 54 Ala. 123.

**1332.** A contract not under seal, wherein one person makes a promise to another for the benefit of a third person, such third person may maintain an action on it, though the consideration did not move from him. *Price v. Trusdell*, 28 N. J. Eq. 200.

**1333.** In a contract for the transportation of freight, it was provided "that in the event of either of the parties failing to comply with the terms of the contract, the party so failing was to pay the other party the sum of one thousand dollars, fixed and settled damages." *Held*, that this was not intended, nor to be construed as meaning a penal sum, but as fixed, settled and liquidated damages, and the defendant was not permitted to show that the plaintiff had not sustained actual damages to that amount. *Ivinson & Co. v. Althorp*, 1 Wyoming, S. Ct. Rpts. 71.

**1334.** Where property was sold and delivered to a third person, on the faith of the promise of defendants to accept his drafts on them for the purchase money, a specific performance of the contract will be enforced. *Saulsbury, Respers & Co. v. Blandys*, 60 Ga. 646.

**1335.** Where at the execution of a writing a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible, although it may vary and materially change the terms of the contract. In debt upon a bond the defendant offered to prove that the bond was given for unpaid purchase money of a certain

lot; that to induce the purchase of said lot, plaintiff verbally agreed that if defendant did not like the property, plaintiff, on request of defendant, would take back the same, and pay defendant a premium and cost of his improvement; that there should be no personal liability by defendant for the purchase money, and that plaintiff should look solely to the property for payment; that plaintiff was not to part with the bond or mortgage; that when defendant asked that the foregoing agreement should be inserted in the papers being executed, plaintiff said it was unnecessary, that his bond was sufficient, and that defendant has asked plaintiff to take back the property as stipulated, which was refused. The court below rejected these offers. *Held*, that they should have been received. *Greenawalt v. Kohne*, 85 Penn. 369.

**1336.** In order to take a parol contract for the sale of land out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory and indubitable proof. The evidence must define the boundaries and indicate the quantity of the land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the change of possession was notorious, and the fact that it had been exclusive, continuous and maintained. And it must show performance or part performance by the vendee which could not be compensated in damages and such as would make rescission inequitable and just. Defendant in ejectment claimed title to land by virtue of a parol sale, possession taken and maintained, improvements, etc. A deed was offered in evidence, signed by plaintiff, which contained a description of the property, and recited the consideration, but which was never delivered to defendant. *Held*, reversing the court below, that the deed, taken in connection with other facts, was sufficient evidence of a parol contract to take the case out of the operations of the Statute of Frauds. *Hart v. Carroll*, 85 Penn. St. 508.

**1337.** A court of equity will not extricate a party from the consequences of his own acts voluntarily committed to carry out an illegal contract relating to the entry of public lands. Generally, those who violate law in their dealings with one another, are left precisely in the same condition they placed themselves. *Ainsworth v. Miller*, 20 Kansas, 220.

**1338.** The reduction of an agreement to writing, signed by the parties, is not necessary to its perfection as a contract, unless it clearly appears that the parties intended that it should be complete as a contract, until so written and signed. *Montague, et al. v. Weil Bro.*, 30 La. 50.

**1339.** A promise to pay for property purchased, "out of the proceeds of the first cotton ginned," is evidence conducing to show the time of payment, but does not prove, or tend to prove, that the seller of the property is to look for his pay alone to the profits made in ginning that season. *White v. Chaffin*, 32 Ark. 59.

**1340.** When an instrument is prepared by the party to be held liable under it, and it is ambiguous in its terms, that construction is to be adopted which is most favorable to the promisee. *Atlantic Ins. Co. v. Manning*, 3 Colo. 224.

**1341.** An act which is forbidden by a statute, or the common law,



whether it be *malum in re* or merely *malum prohibitum*, indictable, or only subject to a penalty or forfeiture, cannot be the foundation of a valid contract. *Lindsey v. Rottaken*, Collector, 32 Ark. 619.

**1342.** When one party submits a proposal for a contract to another, and the latter's acceptance of the proposal includes a material modification of the proposal, no contract will result until the modification has been acquiesced in by the party making the proposal. *Nicholas, Connell v. Alexander Hill*, 30 La. 251.

**1343.** Where two contracts between the same parties are distinct and to be performed at different times, the non-performance of the one is no defence to an action on the other. *Turner v. Rogers*, 121 Mass. 12.

**1344.** When it clearly appears from the evidence that the intent of parties was to form a written contract, neither party will be bound until the contract has been reduced to writing, and signed by both. No alleged verbal agreement, in such case, can be invoked by either party against the other. *Louisa Fredericks, Tutrix v. Robert Fasnacht*, 30 La. 117.

**1345.** Where in a contract to deliver a certain thing, no time for the delivery is fixed, the legal implication is that it shall be delivered within a reasonable time from the date of the contract. *Robert H. Bartley v. City of New Orleans*, 30 La. 264.

**1346.** Where no fiduciary relation exists between the parties, and they are of legal capacity, however disadvantageous or improvident a contract between them appears, a court of equity will not relieve against it, until the party seeking to avoid it clearly proves that it was the result of fraud, mistake, surprise or undue influence practiced upon him. *Malone v. Kelly*, 54 Ala. 532.

**1347.** A contract must be held to have been made when the last act necessary to complete it was done, when no mutual act remains to be performed to entitle either party to enforce it. *Northampton M. L. S. Ins. Co. v. Tuttle*, 40 N. J. Law Reports, 476.

**1348.** Contract founded on an act which a statute prohibits under a penalty is void, although the State does not expressly so provide, and the subsequent repeal of the statute, without any saving clause as to penalties already incurred, will not validate a contract void under the law in existence when the contract was made. *Woods v. Armstrong*, 54 Ala. 150.

**1349.** Contract having an unlawful or immoral cause are not merely void themselves, but as a rule, cannot be the basis of any valid auxiliary contract. *Cummings v. Saux*, 30 La. 207.

**1350.** Where the evidence shows that the parties intended, originally, that the contract of lease should be reduced to writing, neither will be bound until it is signed by both. *Miguel Avendano v. I. W. Arthur & Co.*, 30 La. 316.

**1351.** The written agreement of a debtor who has borrowed certain bonds, to return bonds of the same description, for the same amount, at a certain term, is not a promissory note for the amount of the bonds. The obligations is to return the specific bonds at the time fixed, or pay their value at that time. *Blonin v. Liquidators of Hart & Hebert*, 30 La. 714.

**1352.** The laws which subsist at the time and place of making of

a contract, and where it is to be performed, enter into and form a part of the contract; and that, whether such laws affect its validity, construction, discharge or enforcement. *Roberts' Adm'rs v. Cocke, Etc.*; also, *Murphy v. Gaskins' Adm'rs*, 28 Grattan (Va.) 207.

**1353.** A contract is binding when signed by the party making it, though he may use an English translation of a French name, as Seam for Conture, in his signature thereto. *Auger v. Conture*, 68 Me. 427.

**1354.** One cannot recover for a breach of a contract who is the cause or occasion of its occurrence. *Winch v. Mut. Benefit Ice Co.*, 86 N. Y. 618.

**1355.** A party entitled to rescind a contract on the ground of fraud loses that right by bringing an action to enforce the contract after knowledge of the fraud. *Acer v. Hotchkiss*, 97 N. Y. 395.

**1356.** A promise by one party to do that which he is already under a legal obligation to do is not a sufficient consideration to support a contract on the part of the other party. *Seybolt v. N. Y. L. E. & W. R. R.*, 95 N. Y. 502.

**1357.** The word "sold" in a contract of sale of chattels does not necessarily impart an executed contract. *Anderson v. Read*, 106 N. Y. 333.

**1358.** Where a contract is partly printed and partly in writing, the written matter must prevail over the printed in case of conflict between them. *Hill v. Miller*, 76 N. Y. 32.

**1359.** Reformation of contracts. The jurisdiction of a court of equity to reform a written instrument, in a case free from fraud, can only be exercised where it appears clearly that there has been a mutual mistake on the part of the parties as to the contents of the instrument itself. Where both knew its character and contents when they executed it, it cannot be reformed merely because one of the parties was entitled to and would have exacted a different instrument had he known of extrinsic facts rendering it to his interest so to do. *Whittemore v. Farrington*, 76 N. Y. 452.

**1360.** A contract with persons contemplating the formation of a corporation in reference to matters relating to such corporation when it shall be formed is a contract with such persons personally and not with the corporation. *Cannody v. Powers*, (Mich.) 26 N. W. Rep. 801; *Penn Match Co. v. Hapgood*, (Mass.) 7 N. E. Rep. 22; *Vermont Cent. R. R. v. Clayes*, 21 Vt. 30; *Dayton, Etc., Turnpike Co. v. Coy*, 13 Ohio St. 84.

**1361.** A corporation may become bound to fulfil a contract made in its name and behalf in anticipation of its existence, by afterwards accepting the benefits of the contract. *Low v. Conn. & P. R. R. R.*, 45 N. H. 370.

**1362.** A party who signs a written contract without reading it or causing it to be read to him, where there is an opportunity afforded him of doing so is guilty of such negligence as will prevent him from escaping the legal effect of the contract. *Keller v. Orr*, (Ind.) 7 N. E. Rep. 195; *Gullihier v. Chicago R. I. & P. R. R. Co.*, (Iowa) 13 N. W. Rep. 429; *Moran v. McLarty*, 75 N. Y. 25; *McKinney v. Merrick*, (Iowa, 23 N. W. Rep. 767; *McComack v. Molburg*, 43 Iowa, 561.

**1363.** An agreement between the agent of an insurance company and an applicant for insurance, whereby the former, without authority



from the company, accepted articles of personal property by way of satisfaction of a premium payable in money, is a fraud upon the company, and no valid contract arises therefrom. *Hoffman v. John Hancock Mutual Life Insurance Co.*, U. S. I. C. 92, 161.

**1364.** While negotiations were still pending between an agent of the company and the applicant, touching the precise terms of a contract of payment, a friend paid the premium, but concealed from the agent the condition of the applicant, who was then in *extremis*, and died in a few hours. The agent in ignorance of the facts, delivered the policy. *Held*, that no valid contract arose from the transaction. *Piedmont and Arlington Ins. Co. v. Ewing, Administrator*, U. S. S. Ct. 92, 377.

**1365.** The constitution of a State cannot impair the obligation of a contract. *County of Moultrie v. Rockingham Ten-Cent-Savings Bank*, U. S. S. Ct. 92, 631.

**1366.** A promise made in the Southern States to pay a sum of money specified (and acknowledged to be due) "as soon as the crop could be sold or the money raised from any other source," is a promise to pay the money specified upon the occurrence of either of the events named in the paper, or after the lapse of a reasonable amount of time within which to procure, in one mode or in the other, the money necessary to meet the liability. *Nunez v. Dantel*, 19 Wall. U. S. 560.

**1367.** Where an action against a life insurance company brought by an administrator on a policy purporting to insure the life of the intestate, one of the defences set up was that the answer of the latter to certain questions propounded to him at the time of his application touching his habits of life, etc., were untrue, the burden of proving the truth of such answers does not rest on the plaintiff. *Piedmont and Arlington Ins. Co. v. Ewing, Administrator*, U. S. S. Ct. 92, 377.

**1368.** Where a party knowing the pecuniary condition of a debtor, purchased a claim against him of an ascertained amount, an opinion, however erroneous, expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment. *Blease v. Garlington*, U. S. S. Ct. 1, 92.

**1369.** Mandamus is not the proper remedy to enforce the performance of a duty imposed upon the officers of a private corporation organized for profit merely, where such duty is not specifically enjoined by law and where there is a plain and adequate remedy either at law or in equity. *State, Ex rel. Freon v. Enterprise Carriage Co.*, 39 Ohio State. Boone on Corporations.

**1370.** The capital stock of a corporation is the money or property put into the corporate fund by the subscribers for said stock which fund becomes the property of the corporation. A share of said capital stock is the right to partake according to the amount put into the fund of the surplus profits and upon dissolution of the corporation of the fund remaining after payment of debts. A subscriber may become the owner of a given number of shares but not in the sense that he may take away those shares out of the corporate fund; and the corporation has no power and cannot be compelled while continuing in legal existence and carrying on the business for which it was created to issue and deliver such shares. All that the corporation can do is to issue

written evidence of the existence and ownership of such shares known as stock certificates. *Burrall v. Bush. R. R. Co.*, 75 N. Y. 211.

1371. Where two persons, for a consideration sufficient as between themselves, covenant to do some act, which, if done, would incidentally result in the benefit of a mere stranger, he has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other. *L. O. S. R. R. Co. v. Curtiss*, 80 N. Y. 219.

1372. Where the holder of a promissory note, ostensibly acting for himself, sells the same for a valuable consideration, and upon the sale, promises orally that the note is good and will be paid at maturity, the promise is not within the statute of frauds, and the promissor is liable thereon in case of non-payment. The promise may be regarded, not as one to answer for the default of the maker, but as one to pay the purchaser for the money had, in case the maker does not. *Milks v. Rich*, 80 N. Y. 269.

1373. A party binding himself to deliver personal property can only be relieved in this respect on the ground of clear refusal of the other party to receive or becoming disabled to perform his part of the contract. *Smoot's Case*, 15 Wall. U. S. 37.

1374. A party to whose duty it is to prepare a written contract according to a previous agreement, if he prepares one materially changing the terms of the previous agreement, and delivers it as in accordance therewith, commits a fraud entitling the other to relief. *Hay v. S. F. Ins. Co.*, 77 N. Y. 235.

1375. Where the purpose of a promise to pay the debt of a third person is to secure a benefit to the promissor, by relieving his property from a lien, or securing or confirming his possession, the promise is original and not collateral, and so is not within the statute of frauds. *Neftel v. Lightstone*, 77 N. Y. 96.

1376. Where a party has elected to sue upon a written contract as it is, and has been defeated, he is bound by that election, and cannot thereafter bring an action to reform the contract. *Steinbach v. Relief F. Ins. Co.*, 77 N. Y. 498.

1377. Equity will not readily set aside a reasonable contract, made for the sake of peace, though want of money may have been an inducing cause which one of the parties had to the making of it. *French v. Shoemaker*, 14 Wall. U. S. 315.

1378. Where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter. The principle applied. *Noonan v. Bradley*, 9 Wall. U. S. 395.

1379. While it is the province of the courts to construe contracts, yet where the meaning of a contract is obscure and depends upon facts *aliunde*, in connection with the written language, the question of construction may be one of fact for the jury. *First Nat. Bank of Springfield v. Dana*, 79 N. Y. 108.

1380. Defendant was the editor of a newspaper owned by a corporation, a portion of the stock of which he held. W., who was plaintiff's president, owning a majority of its stock, was also a stockholder in said corporation. Defendant was advised by the publisher



of the paper, who had been to see W. and other stockholders, that they had concluded to levy an assessment upon the stock, and that they had agreed to furnish the money for his share upon pledge of his stock. It was represented to defendant that W. had paid his subscription to the stock in full, that there was to be an additional assessment upon all the stock, and that W. was to pay his share. The note in suit was thereupon made, and delivered to the publisher. W. had not paid his assessment, nor had he paid in full for his stock. At a subsequent meeting of the stockholders of the newspaper company it was agreed that defendant should withdraw from it and give up his stock, the stockholders agreeing to assume payment of the note; and defendant thereupon surrendered his stock. Upon being advised that a claim was made against him, defendant wrote to plaintiff, stating the facts, and that if sued he would be obliged to sue the company and its stockholders. Plaintiff's cashier thereafter wrote defendant, proposing that if defendant would sue the newspaper company for the performance of the contract to pay the note, it would pay one-half the cost, adding that if the proposition suits it will avoid the necessity of a suit upon the note. An agreement was entered into upon the basis of this letter. Defendant brought an action against said company, obtained judgment, and upon return of execution unsatisfied, brought suit against the stockholders, which was pending when this action was commenced. The court directed a verdict for plaintiff; *held*, error; that if the letter of plaintiff's cashier stood alone, it was a question whether the contract was not satisfied by bringing the action and obtaining the judgment against the company; if all the letters were to be considered it was not clear that a suit against the stockholders was not a part of the arrangement; and that this was a question for the jury. *First Nat. Bank of Springfield v. Dana*, 79 N. Y. 108.

1381. Plaintiff contracted to convey to H. certain premises for \$1,350; \$300 was paid down and the balance was agreed to be paid in annual installments. H. assigned his contract to defendants in payment of two notes, the latter agreeing to pay enough in addition to make the purchase price \$300, H., however, reserving the right to redeem. In an action brought to recover installments due and unpaid on the contract, H., as a witness for plaintiff, testified that defendants were to pay up the contract. *Held*, that the evidence failed to show an express agreement on the part of defendants to pay the balance due plaintiff; that the most that could be claimed was that defendants agreed to make advances for H., to be repaid when he redeemed; that there was therefore no assumption of the debt, so as to make it the debt of defendants, at least no promise intended for the benefit of plaintiff; and that, therefore, plaintiff was not entitled to recover. *Roe v. Barker*, 82 N. Y. 431.

1382. After installments had become due, defendants requested plaintiff to give further time, which he did in consideration of an oral promise to pay the debt. *Held*, that this did not authorize the reversal of a judgment for defendants, as no such cause of action was set forth in the complaint, and as the promise was void under the statute of frauds; and that, conceding it was supported by a sufficient consideration in the agreement for forbearance, it was not thereby made valid. *Roe v. Barker*, 82 N. Y. 431.

**1383.** The law will not presume a contract illegal, or against public policy and so void, when it is capable of a construction which will make it lawful and valid. *Ormes v. Dauchy*, 82 N. Y. 443.

**1384.** To excuse non-performance of an express condition in a contract, it must appear that performance could not, by any means, have been accomplished. *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543.

**1385.** In the advertisement for proposals for constructing a sewer in the city of New York a price was fixed to be allowed for rock excavation, and the price so fixed was included in the contract, thus withdrawing the item from competition. *Held*, that this was not a compliance with the provision of the statute requiring the work to be let by contract, after advertisement, to the lowest bidder; and that the contract and an assessment for the work was illegal and void. *In re Manhat. Savings Institution*, 82 N. Y. 142.

**1386.** A paper dated in one of the Southern States and promising to pay with interest a sum of money specified and acknowledged to be due as soon as the crop can be sold or the money raised from any other source is not either in form or effect a promissory note. *Nunez v. Dautel*, 19 Wall. U. S. 560.

**1387.** Where, in part performance of an agreement, a party has advanced money, or done an act, and then stops short and refuses to proceed to its conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, such first-named party will not be permitted to recover back what has been advanced or done. *Hausbrough v. Peck*, 5 Wall. U. S. 497.

**1388.** Where a deed to A. though executed before a mortgage of the same property to B., is not delivered until after the execution and record of the mortgage, the mortgage will take precedence of it. *Par-melee v. Simpson*, 5 Wall. U. S. 81.

**1389.** The obligation of a contract, valid at the time of making by the laws of the State, or by judicial decisions upon the laws, cannot be impaired by any decision of the courts of the State subsequently made. *Chicago v. Sheldon*, 9 Wall. 50; also, *the City v. Lamson*, 9 Wall. U. S. 478.

**1390.** Where a purchaser of real estate fails to comply with the contract under which he obtained possession, the vendor may treat the contract as rescinded, and regain the possession by ejectment. *Burnett v. Caldwell*, 9 Wall. U. S. 290.

**1391.** Where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal, if there be no imputation of *madum in re*, and if the good part show a sufficient cause of action, it is error to sustain demurrer to the whole. *Gelpcke v. City of Dubuque*, 1 Wall. U. S. 221.

**1392.** When parties have reduced their contracts to writing, conversations controlling or changing their specifications are, in the absence of proofs no more received in a court of equity than in a court of law. *Willard v. Taylor*, 9 Wall. U. S. 557.

**1393.** Where—on the sale of a steamboat whose owners had contracted various debts in building and furnishing her, some of which debts were liens on the boat and some not—certain persons, friends of the purchaser, agreed to “defend and have the said vendor, free and



harmless of any and all claims and demands that may arise or be brought against said steamboat," *held*, that the expression referred to debts existing at the date of the sale and not to debts that might be contracted after it; and meant to protect the owner from all liability arising from his part-ownership of the boat, irrespective of the fact whether the debts were liens on the boat or not. *Moran, et al. v. Prather*, 23 Wall. U. S. 492.

1394. In the matter of a contract, a distinction sometimes exist between a *motive* which may induce entering into it and the actual consideration of the contract. This subject illustrated. *Philpot v. Gruninger*, 14 Wall. U. S. 570.

### CONVERSION.

1395. In November, 1866, defendants, who were engaged in towing boats upon the Hudson River, were employed by the master of a canal boat to tow the boat from Troy to New York. In January, 1867, the bill for towing not having been paid, it was placed by defendants' direction in the hands of a New York law firm for collection by some proceeding against the boat. Said attorneys proceeded under the Act of 1862 (Chap. 482, Laws of 1862), providing "for the collection of demands against ships and vessels," which Act had not then been declared unconstitutional; they caused the vessel to be seized and sold under the provisions of that act by the sheriff of Kings County, and a portion of the proceeds were paid to defendants. In an action brought by the owner of the boat to recover for its conversion, it was conceded that said Act was unconstitutional and the proceedings under it void. *Held*, that defendants were liable. *Poucher v. Blanchard*, 86 N. Y. 256.

1396. Where a promissory note, intrusted by the maker to another to be used for a special purpose, is diverted by the latter, an action lies against him for the conversion thereof. *Hynes v. Patterson*, 95 N. Y. 1.

1397. An attaching creditor cannot defend an action, brought by an assignee of the debtor, for the conversion of a chose in action attached, by showing fraud in the assignment. *Castle v. Lewis*, 78 N. Y. 131.

1398. An unauthorized sale by a broker of stock purchased by him for a customer, although a conversion, does not of itself constitute such a fraud as was contemplated by the provisions of the late Bankrupt Act (U. S. Re. S., § 5117), which declares that no debt created by the fraud of the bankrupt shall be discharged by proceedings in bankruptcy. *Stratford v. Jones*, 97 N. Y. 586.

1399. Nor does the insolvency of the broker, at the time of the conversion conclusively establish a fraudulent intent. *Ibid*.

1400. In an action brought by the defendants herein against S., plaintiff's assignor and others, an attachment against the property of the defendants was granted upon affidavits making a *prima facie* case, and upon a full compliance with all the formal requirements, on the ground that defendants were about to assign, dispose of and

secrete their property, with intent to defraud their creditors. The attachment was levied upon property of S. The defendants in the attachment suit thereupon moved on affidavits to vacate the writ; the motion was denied at Special Term, but the General Term, on appeal, reversed the order of Special Term, and granted the motion. Pending the appeal, most of the attached property was sold as perishable, by order of the court. After the vacating of the attachment, the proceeds of the sale were paid over by the sheriff to the plaintiff herein, to whom was also delivered the property unsold. *Held*, that the taking of the property was not a conversion: that the attachment having been lawfully issued, was a complete justification, both to the officer and the party, and it did not cease to be a protection after it was vacated for acts done under it; also, that defendants, not having received either the property or its value, were not responsible therefor to plaintiff. *Day v. Bach*, 87 N. Y. 56.

## CONVEYANCES.

**1401.** A deed recorded after fifteen days is notice to purchasers, mortgagees and judgment creditors subsequent to such record. *Sanborn v. Adair*, 29 N. J. 338.

**1402.** A deed not recorded in fifteen days is void as to a subsequent deed for a valuable consideration, without notice, and cannot regain its priority by being placed on record before such subsequent deed recorded. *Ibid*.

**1403.** Such subsequent deed cannot lose its priority over the earlier deed by not being put on record, but is, in its turn, if not recorded in fifteen days, subject to be postponed to a later deed, taken without notice for a valuable consideration. *Ibid*.

**1404.** If a grantee in a deed be a *bona fide* purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud to invalidate the deed. Fraud cannot be presumed; it must be proved by clear and satisfactory evidence. *Herring, et al. v. Wickham & Wife, et al.*, 29 Grattan, Va. 628.

**1405.** A voluntary conveyance is void as against creditors holding debts previously contracted. *Russel, et al. v. Thatcher, et al.*, 1 Del. 320.

**1406.** A voluntary conveyance, though without a fraudulent intent, is void, as against creditors, under the statute of 13 Elizabeth. *Logan, et al. v. Brick, et al.*, 2 Del. 206.

**1407.** Withholding a deed from the records for several years may, as an element in the proof fraud, be explained so as to rebut any presumption of fraud arising from it. *Thouron v. Pearson*, 29 N. J. 487.

**1408.** A voluntary conveyance of real estate made by a husband, just before his marriage, to his mother, without any valuable consideration, and kept a secret until years after the marriage, is fraudulent and void as against the wife's claim of dower.

**1409.** Although a trustee may become a purchaser from a *cestui*



*que trust* upon fair principles and proper consideration, yet where the transaction has no pecuniary consideration to uphold it, it is liable to the closest scrutiny due from courts in such transactions.

1410. To afford complete protection to the trustee who deals with a *cestui que trust*, such statement and information should be given by the trustee to the *cestui que trust* as to the extent and value of his interest in the estate, so that a court may see that the proposed dealing is fair, and that the act was entered upon with as much knowledge, on the part of the *cestui que trust*, as was possessed by the trustee in respect to the trust property. *Pomeroy v. Pomeroy*, 54 Howard, N. Y.

1411. It seems the grantee, in a conveyance by deed-poll containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as covenantor to pay the mortgage. *Bowen v. Beck*, 94 N. Y. 86.

1412. A specific devise of real estate can only be revoked by the destruction of the will or the execution of another will or codicil, or by alienation of the estate during the testator's life. *Burnham v. Comfort*, 108 N. Y. 535.

1413. While a conveyance will be so construed as to carry into effect the intent of the parties, so far as it can be collected from the whole instrument, yet whatever the intention may be, nothing will pass by a deed except what is described therein. *Thayer v. Pinton*, 108 N. Y. 394.

1414. Conveyance—voluntary is void if it tends to hinder and delay creditors, although it may not otherwise injure them. A conveyance being held fraudulent and void as against creditors, certain mortgages of the property conveyed, taken by the vendor by way of consideration, were nevertheless held good in the hands of an assignee for value without notice. *Logan, et al. v. Brick, et al.*, 2 Del. 206.

1415. He who buys any part of the avails of a scheme to defraud creditors, in order to keep what he gets, must not only pay for it, but he must be innocent of any purpose to further the fraud. *De Witt v. Van Sickle*, 29 N. J. 209.

1416. Property conveyed in fraud of creditors will be reclaimed for the benefit of creditors, no matter who may happen to hold it, if reclamation can be effected without injustice to innocent third persons. *De Witt v. Van Sickle*, 29 N. J. 209.

1417. If the grantee of property conveyed in fraud of creditors dispose of it before proceedings are instituted to reach it, he will be held answerable for its value. *Post v. Stiger*, 29 N. J. 554.

1418. Conveyances by a solvent father to his two sons, in consideration of services rendered by them for many years, made openly, the deeds being recorded soon afterwards, and the sons remaining in continuous possession thereafter, are good against creditors of the father. *Horton v. Castner*, 29 N. J. 536.

1419. A conveyance of the fee to a mortgagee will not merge his mortgage, where such intention on his part does not exist, and no detriment to other encumbrancers shown. *Andrus v. Vreeland*, 29 N. J. 394.

1420. The registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title from the same grantor, but is not notice to a purchaser of the legal title from the

person who appears by the record to be the real owner. *Tarbell v. West*, 86 N. Y. 280.

**1421.** When land is by one deed conveyed to two or more persons, who contributed to the purchase money in unequal amounts, their share in the property will, in the absence of an agreement to the contrary, be in proportion to their respective contributions. *Shroser v. Isaacs*, 28 N. J. Eq. 320.

**1422.** Where the grantor in a deed covenants that he was well seized, etc., and had good right to convey, etc., and then added that he "would warrant and defend the grantee, his heirs and assigns, against all and every person lawfully claiming, or to claim the whole, or any part of the premises, except against the United States." *Held*, that both covenants must be taken and construed together, and that the latter restricted and qualified the first. *Dunn v. Dunn*, 3 Colo. 510.

**1423.** Insolvent debtor seeking to prefer certain creditors by mortgage, no ground for equitable relief. *Heidingsfelder, et al. v. Slade & Etheridge, et al.*, 60 Ga. 396.

**1424.** From the mere fact that upon the sale of a piece of property belonging to the wife the husband received the price, it does not necessarily follow that a debt of the latter to the former was intended to be or was created. *Hunt v. Spencer*, 20 Kansas, 126.

**1425.** A voluntary conveyance can be sustained, as against existing creditors, only when under all the circumstances of the case the property retained by the grantor furnishes reasonable and adequate provisions for the discharge of his debts. *Ibid*.

**1426.** A contract for the conveyance of real estate, not in writing, is void by the statute of frauds. When a party to such contract has complied with its conditions, and made all the payments required by its terms, he is entitled to recover back such payments, in case the other party refuses to perform on his part. Nor will it defeat his right of recovery that he is in possession of the premises agreed to be conveyed. *Jellison v. Jordan*, 68 Me. 373.

**1427.** Sale of all his landed estate by husband to wife, if *bona fide*, conveys title; *aliter*, if to hinder or defraud creditors, though subsequently perfected by formal conveyance. *Thompson v. Feagin*, 60 Ga. 82.

**1428.** A party loses no right by a mere change in the form of his securities, and the holder of a new note, given in exchange for an old one, may attack a conveyance which would be fraudulent as to the old one. *Thomson v. Herter*, 55 Miss. 656.

**1429.** A voluntary conveyance from father to son, made by the grantor, with an intent to defraud his subsequent creditors, is void as to such creditors, with either allegation or proof that the grantee participated in that intent when he received or accepted the deed. In such case the intent of the grantor alone determines the validity of the conveyance. *Langton v. Harder*, 68 Me. 208.



## CORPORATIONS.

**1430.** If a corporation, in excess of its powers conferred by its charter, receives a sum of money on condition that it will return it, if an additional sum is not raised within a given time, and the condition is broken, an action may be maintained against the corporation on an implied promise to return the money, and a demand for its return may be submitted to arbitration. *Morville v. American Tract Society*, 123 Mass. 129.

**1431.** The superintendent of a mining company has no authority by virtue of his office to borrow money on the credit of the corporation. The president of the corporation has no authority, as such, to undertake, in the corporate name, for the repayment of such an unauthorized loan. *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colorado, 565.

**1432.** One for whom another has, without authority, assumed to act, must not only disavow and repudiate what has been done but must also give notice of such repudiation to those to be affected thereby, if he would avoid the inference of assent, which the jury are otherwise at liberty to indulge. *Ibid.*

**1433.** Where goods are sold, and credit given to a corporation, an officer and stockholder cannot be held personally liable for the debts thus created, upon a promise to pay or see them paid, unless such promise be in writing. *Searight v. Payne*, 2 Tenn. Eq. 175.

**1434.** If a certificate of shares in the capital stock of a corporation is taken without the owner's knowledge, and, together with forged power of attorney, is delivered to an auctioneer for sale, to whom the corporation issues a new certificate in the name of the auctioneer, who delivers it to an innocent purchaser for value, to whom, in turn, on its presentation, the corporation issues a new certificate, the owner is entitled, on a bill in equity against the corporation and purchaser, to a decree to compel the corporation to issue to him a certificate for his shares and to pay him the dividends thereon, but not to a decree against the purchaser; and, upon such bill, the court cannot decide, unless by consent, whether the corporation is liable to the purchaser. *Pratt v. Taunton Copper Co.*, 123 Mass. 110.

**1435.** An officer and stockholder of a corporation who states to a creditor that the corporation is, in his opinion, solvent, does not thereby make himself liable to the creditors, if the statement was made in good faith, although the corporation was, in fact, at that time insolvent. *Searight v. Payne*, 2 Tenn. Eq. 175.

**1436.** Corporation bonds, payable to bearer or order, and the coupons annexed thereto, are now recognized as possessing all the ordinary properties of negotiable instruments. Such bonds or coupons, although stolen, are collectible in the hands of a *bona fide* holder, who took them for value, in the usual course of business, before maturity and without notice. *Spooner v. Holmes*, 102 Mass. 503; *Evertson v. Nat. Bank of Newport*, 6 N. J. 14; *Carpenter v. Rommel*, 5 Phila. Pa. 34.

**1437.** Where, under the act of 1869 (Chap. 907, Laws of 1869), authorizing municipal corporations to aid in the construction of rail-

roads, and prior to the passage of the amendatory act of 1871 (Chap. 925, Laws of 1871) proceedings had been regularly taken to bond a town in aid of a railroad, and the county judge had made his adjudication and record and had appointed commissioners, *held*, that the proceedings were not invalidated by said amendatory act, and that the commissioners had authority, after its passage, to subscribe for stock and issue bonds under and in pursuance of the judgment of the county judge. *Syracuse Savings Bank v. T'n Seneca Falls*, 86 N. Y. 317.

**1438.** The words, "knowing it to be false" in the provision of the Manufacturing Act (§ 15, chap. 40, Laws of 1848), making officers of a corporation organized under it liable for signing a false report, mean a willful misrepresentation, with actual knowledge of its falsity, not merely such constructive knowledge as can be imputed from the presumption that the officer signing knew the law and comprehended the precise import of the language used, when construed with reference to the statute. *Pier v. Hanmore*, 86 N. Y. 95.

**1439.** A railroad corporation seeking to take property *in invitum* for the purpose of its road, must be able to show, first a legislative warrant, and, second, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of that term, or that the business it is organized to carry on is public, and that the taking of private property for its purposes is a taking for public use. *In re N. F. & W. R. Co.*, 108 N. Y. 375.

**1440.** A corporation, in the absence of statutory restrictions, has the right to prefer one creditor to another in the distribution of its property. *Coats, Assignee, Etc. v. Donnell, et al.*, 94 N. Y. 168.

**1441.** When under a charter provision, a stockholder is liable for the debts of the corporation to the amount of his stock, this liability arises out of contract; and though the debt may accrue after the stockholder's death, it is a claim against his estate, and an action lies against his executor. *Manville v. Edgar*, 8 Mo. App. 324.

**1442.** The president of a business corporation has no power, as such to constitute a general business manager without the consent of the directors. *Vogel v. St. Louis Museum, Opera, and Fine Art Gallery*, 8 Mo. App. 587.

**1443.** The franchise to be a corporation is not a subject of sale and transfer, unless made so by a statute, which provides a mode for exercising it. *Memphis & Little Rock Ry. v. Railroad, Com's*, 112 U. S. 609; also, *Morgan v. Louisiana*, 93 U. S. 217; and *Wilson v. Gaines*, 103 U. S. 417.

**1444.** An innocent purchaser of stock, taken in good faith as paid up, in the absence of anything to put him upon inquiry, and where the books of the corporation would give no notice that the stock was not paid up, is not liable to the creditors of the corporation for the amount unpaid. *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496.

**1445.** A remedy given by the statutes of another State to creditors of a corporation against its stockholders is not available here. *Christensen v. Eno*, 106 N. Y. 97.

**1446.** Corporation issuing bills as currency without authority and contrary to law is not liable to the holder for money had and received, though bills are void, especially where the receiving as well as issuing is contrary to law. *Thomas v. Richmond*, 12 Wall. U. S. 349.



1447. Where the issue of bills as currency, except by banks, is prohibited, city has no power, without express authority, to issue them. *Ibid.*

1448. In the absence of proof showing a want of authority on the part of a corporation in making a contract or of a violation of its charter is *ultra vires* will not be upheld; every presumption is to the contrary. *Reder Life Raft Co. v. Roach*, 97 N. Y. 378.

1449. A corporation has no implied authority to increase or diminish its capital stock, and can only do so when, and as authorized by statute. *Sutherland v. Olcott*, 95 N. Y. 93.

1450. Power to issue bonds carries with it power to cancel those already issued, but not put in circulation, and to issue new ones, and to make them payable beyond the limits of the county or state where they are issued. *Lynde v. The County*, 16 Wall. U. S. 6.

1451. If bonds issued by a city having power to borrow money and provide for payment of her debts, under an ordinance authorizing them for that purpose, are defective and void, city is liable as a borrower for the money received. *Louisiana v. Wood*, 102 U. S. 294.

1452. Where a stockholder of a manufacturing corporation, whose stock has not been fully paid in, in good faith makes an absolute and valid transfer of his stock to another, he is not liable for calls made after the transfer. *Billings v. Robinson*, 94 N. Y. 415.

1453. The unissued shares of stock of a corporation are not assets in its hands, and in the absence of any statutory provision, or provision of its charter, one to whom shares have been transferred by it gratuitously does not, by accepting them, become a debtor to the company or make himself liable to pay the nominal face of the shares as upon a subscription for the stock or a contract, and an action is not maintainable against him by a creditor of the corporation to compel him to pay for such shares. *Christensen v. Eno*, 106 N. Y. 97.

1454. So, also, where bonds of a corporation have been issued by it gratuitously to a stockholder, but no portion of its property or assets has been applied in payment thereof, the stockholder is not liable to account to creditors for the proceeds of the sale of said bonds by him. *Christensen v. Eno*, 106 N. Y. 97.

1455. Directors of a corporation have no power to increase the capital stock of a corporation when the charter authorizes it to be increased "at the pleasure of the corporation." *Railway Company v. Allenton*, 18 Wall. U. S. 233.

1456. The fact that the charter declares that "all the corporate powers of the said corporation shall be vested in and exercised by a board" of directors does not alter the case. *Ibid.*

1457. Although a subscription for stock of a railroad company be duly authorized by the requisite number of the qualified voters of a township, if the company, before the subscription be actually made, becomes consolidated with another, thereby forming a third, the county court in Missouri is not empowered to subscribe, on behalf of the township, for stock of the new company and issue bonds in payment therefor. *Harshman v. Bates County*, 92 U. S. 569.

1458. The capital stock, franchise, and all the real and personal property of a corporation, are justly liable to taxation; and a rule which ascertains the value of all this, by ascertaining the cash value

of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other. *State Railroad Tax Cases*, 92 U. S. 575.

**1459.** Deducting from this the assessed value of all the tangible real and person property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect. *Ibid.*

**1460.** Under the laws of Iowa, a railroad company, having power to issue its own bonds in order to make its road, may guarantee the bonds of cities and counties which have been lawfully issued, and are used as the means of accomplishing the same end. *Railroad Company v. Howard*, 7 Wall. U. S. 392.

**1461.** The doctrine announced in *Upton v. Fribilock*, *supra*, that the original holders of the stock of a corporation are liable for the unpaid balance at the suit of its assignee in bankruptcy, without any express promise to pay reaffirmed. *Webster v. Upton*, Assignee, 91.

**1462.** The transfer of stock is liable for calls made after he has been accepted by the company as a stockholder, and his name registered on the stock books as a corporation; and, being thus liable, there is an implied promise that he will pay calls made upon such stock while he continues its owner. *Ibid.*

**1463.** A purchase of stock is of itself authority to the vendor to make a legal transfer thereof to the vendee on the books of the company. *Ibid.*

**1464.** Stockholders in a corporation need not be individually made parties in a creditor's suit where their interest is fully represented both by the railroad company and by a committee chosen and appointed by them. *Railroad Co. v. Howard*, 7 Wall. U. S. 392.

**1465.** Members of a corporation to whom a certificate of organization as a corporation has been issued by the secretary of the commonwealth in accordance with the statute of 1870, c. 224, are not liable as partners, by reason of having transacted business before the whole of the capital stock has been paid in, in violation of section 32 of that statute. *First Nat. Bank of Salem v. Almy*, 117 Mass. 476.

**1466.** A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other act of the legislator. *Davenport v. Kleinschmidt*, 6 Mont. 502; *Crampton v. Zabriskie*, 101 U. S. 601, 604, 609; *Rice v. Smith*, 9 Iowa, 576; *Williams, et al. v. Pungy, et al.*, 25 Iowa, 436; *Leudt v. Town of Sharon*, 34 Conn. 108; *People v. Mayor*, 32 Bastour, N. Y. 35; *Christopher v. Mayor*, 13 Bashour, N. Y. 567; *Mayor v. Gill*, 31 Md. 375; *Smith v. Appleton*, 19 Wis. 493.

**1467.** A subscriber for certain shares of a corporation, by accepting the same and paying an assessment thereon, estops himself from denying the existence and validity of the contract of subscription. *Inter Mountain Pub. Co. v. Jock*, 5 Mont. 568; also, *Philips' Academy v. Davis*, 11 Mass. 113.

**1468.** An incorporated company in England had received an application from one Harris for shares of its stock on March 5th. On the 16th the company sent him notice that the shares had been allotted to him. The letter containing this notice was received by him on the 17th. But on the 16th, he had posted a letter withdrawing his appli-



cation for shares. Upon appeal, it was held that the contract was regarded as complete as soon as the company's letter, giving notice of the allotment, was committed to the post, addressed, as Harris had requested. *Harris' Case*, 7 L. R. Ch. 587.

**1469.** This principal of law has been affirmed in Pennsylvania, in *Hamilton v. Lycoming Mut. Ins. Co.* 5 Barr. 339; in Kentucky, *Chiles Nelson*, 7 Dana, 281; in Georgia, *Levy v. Cohen*, 4 Ga. 1; also, *Bryant v. Booze*, 55 Ga. 438; in New Jersey, *Hallock v. Com. Ins. Co.* 2 Dutcher; *Wright v. Bigg*, 21 E. L. and E. 591; *Boston and Maine R. R. v. Bartlett*, 3 Mass. Cush. 224.

**1470.** Directors of a company are not to be held personally liable to find cash for checks drawn by them as officers of their company upon the company's bank, and which the bank may choose to honor when the company has no funds at the bank. *Beattie v. Ebury*, (Lord), 44 L. J. Chanc. 20; 7 L. R. H. L. Cas. 102 English.

**1471.** All persons dealing with a company are bound to take notice of its external position, as evidenced by its articles of association and partnership deed; but they are not bound to inquire into its internal management, provided that their transactions with it are such as might legally take place and be consummated under the articles of association. *Mahoney v. East Holyford Mining Company*, 33 L. T. N. S. 383; 9 Ir. R. C. L. 306 H. L. English.

**1472.** Some of the directors of a banking company, whose duty it was, as directors, to watch over and regulate the completion of a contract entered into by S., to take up a large number of shares in the bank at his request, and before he had paid for, and became the owner of the shares, entered into personal contracts with him to take some of the shares off his hands. They did so, and realized profits by the sale of the shares, and also by the sale of *bonus shares* issued in respect of the shares so taken by them from S. Held, that they must account for all such profits to the bank. *Parker v. McKenna*, 10 L. R. Ch. 96; 23 W. R. 271 English.

**1473.** When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder for any infirmity than any other commercial paper. *City of Lexington v. Butler*, 14 Wall. U. S. 282.

**1474.** A creditor's bill may be maintained against the directors of an insolvent corporation for mismanagement of its affairs. *Penn. Bank to use v. Hopkins, et al.*, 111 Penn. 328.

**1475.** Where an instrument is incomplete, as if any essential part is in blank, and is afterwards filled up by the thief, or holder through the thief, no recovery can be had. The place of payment was left in blank, and before it was filled up by the president, the bonds were stolen. Held, that a *bona fide* holder could not, by inserting the name of a place in the blank, recover. *Maas v. Missouri R. R. Co.*, 11 Hun. N. Y. 8; also, *Jackson v. Vicksburg Co.*, 2 Woods, 141. The thief's insertion of the name of a payee in the blank left for that purpose is not such an alteration as will avoid the bond. For the fact of the bond not being payable to a particular person does not render it non-negotiable. Same rule applies to a coupon. *Dutchess Co. Ins. Co. v.*

*Hachfield*, 1 Hun. N. Y. 675; *Smith v. County*, 54 Mo. 58; *Boyd v. Kennedy*, 9 Vt. 1846.

1476. The *status* of a corporation doing business in a State other than that in which it was incorporated was clearly defined by the Supreme Court of the United States in the case of the *Bank of Augusta v. Earle*, 13 Peters, 538. *Held*, "That it exists only in contemplation of law and by force of the law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creator, and cannot emigrate to another sovereignty."

1477. An action for injuries caused by the fraudulent acts, or for misapplication or waste of corporate funds, by an officer of a corporation, must be brought in the name of the corporation, unless such corporation or its officers refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such case the corporation must be a party defendant. *Greaves v. Gouge*, 54 Howard, N. Y. 272.

1478. The charter of a corporation provides that no "stockholder in said corporation shall have the right to transfer his shares therein, without first giving ten days' notice in writing of such intention, and ten days' refusal thereof to said corporation, at the lowest price at which he will sell to any other person, and if in such case said corporation elect to purchase said shares at said lowest price, such stockholder shall, on the price being offered to him, convey said shares to said corporation." A stockholder offered to the corporation a certain number of shares at a gross price, and subsequently sold to a third party a smaller number of shares at a given price per share. *Held*, that the offer to the corporation did not comply with provisions of the charter, and that the corporation could not be compelled to allow the transfer of the stock sold upon its books. *Sweetland v. Quidnick Co.*, 11 R. I. 328.

1479. In case a corporation on request refuses or neglects to bring suit against a defaulting officer, such suit may be brought by a stockholder for himself and his co-stockholders, making the corporation a party respondent. *Hazard v. Durant*, 11 R. I. 195.

1480. A corporation cannot gratuitously condone or release the fraud of a defaulting officer, unless by a unanimous vote of its stockholders. *Trenton Mutual Life Insurance Co. v. Johnston*, 24 N. J.; also, 98 Mass. 381; approved, *Clark v. Allen*, 11 R. I. 205.

1481. Where the charter does not require the payment of a certain amount at the time of subscribing for stock, but the agreement of subscription does, the failure to make such payment does not vitiate the subscription. *Water Valley Manufacturing Co. v. Seaman*, 53 Miss. 655.

1482. The president of a bank may contract, on sufficient consideration, with the defendant in a judgment in favor of the bank, to enter a *remittitur* of the judgment. *Case v. Hawkins*, 53 Miss. 702.

1483. A bank which issues bills for circulation as money is a public corporation; but a bank, which beyond a power to contract in its corporate name, has no power beyond those which every other person possesses, must be deemed a *private* corporation. *Attorney-General v. Simonton*, 78 N. C. 57.



1484. Coupons pass from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title, but does not impart a guaranty of payment. *Ketchum v. Duncan*, 96 U. S. 659.

1485. The personal liability of the officers and stockholders of a corporation for a debt contracted by the corporation is inconsistent with the idea of a body corporate at common law, and can arise only out of some statutory provision. *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. Law Reports, 52.

1486. A creditor of the Eastern Railway Co. held its note, and, as collateral security for the same, three other notes of the corporation, with coupons attached, of a kind regularly quoted in the market, is entitled, under the statutes of 1876, ch. 286, to prove only the amount of the original note against the company. *Third Nat. Bank v. Eastern Railroad Co.*, 122 Mass. 240.

1487. The defendants were an incorporated company, the capital of which was \$30,000, in 100 shares of \$300 each, 90 of which had been subscribed for, and paid up in full by duly made calls thereon. Subsequently the defendants employed the plaintiff to take charge of their business, who was appointed president, at a salary of \$1,200. He subscribed for seven shares of the unallotted stock, debited himself with the amount thereof, \$2,100, in the company's books, and afterwards paid it. Afterwards, desiring to obtain control of the company, he arranged with four of the stockholders for the transfer to him of their stock, but one of them, M., to enable him to remain as a director, was to, and did subscribe for the three remaining shares unallotted. Subsequently the plaintiff wished to withdraw from this arrangement, and the parties agreed to cancel it; but M. was to be relieved of the three shares, and M.'s name was accordingly erased, and the plaintiff's inserted, as subscriber for three shares, the substitution being made either by plaintiff himself, or by the bookkeeper by his direction. It was also arranged between the plaintiff and the other directors that this stock should be entered in the stock-book as paid up in full, but the plaintiff was to be debited with the \$900, to be paid out of his salary as president. Accordingly the plaintiff, with his knowledge and assent, was so debited, and from time to time, as his salary became payable, it was set off against it, and a balance afterwards struck in the books on this basis. There was no by-law regulating calls or transfers of stock, and no calls made on the plaintiff for either amounts subscribed by him, and no transfer from M. to plaintiff, except in the manner stated. *Held*, that no transfer was necessary, as the plaintiff's subscription must be held as an original one, nor were any calls required, for the plaintiff by his conduct had impliedly agreed that none need be made, and both he and the company were estopped from denying his ownership of the shares. The plaintiff having sued defendant for his salary; *Held*, that defendants were entitled to set off the amount due on his stock. *Held*, also, that they were entitled to have judgment in their favor for the excess of the set-off over the plaintiff's claim, and that for such purpose no special prayer or conclusion in their plea of set-off was necessary. *Smart v. Bowmanville Machine and Implement Co.*, 25 Upper Canada Com. Plea. Repts. 503.

1488. The stockholders of a corporation have no right to appropriate any part of its assets to pay salaries due them as officers of the

company, or due them on any other account, until all creditors, who are not stockholders, have been paid. *Cochran v. Ocean Dry Dock Co.*, 30 La. 1365.

1489. No loss suffered by a stockholder, in consequence of a call authorized by the charter of the corporation, made upon each stockholder to pay a proportion of the price due on his stock, will give rise to a claim for damages against the directors of the corporation. *Succession of Woods*, 30 La. 1002.

1490. The *bona fide* sale of the stock of an incorporated company, coupled with a power of attorney to the vendee to transfer it on the books of the company, is made complete by the delivery to the vendee of the certificate of stock. It is not necessary to the perfection of the sale, and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer of the stock should have been made on its books. *Samuel & A. W. Smith v. Crescent City Live Stock Landing and Slaughter House Co.*, 30 La. 1378.

1491. Chartered bank adjudicated a bankrupt, a member of its last active board of directors (the board in existence when the failure occurred and the act of bankruptcy was committed), cannot buy up claims against it at a discount, and entitle himself to credit thereafter at full face value in settlement with creditors on his personal liability as a stockholder. At least this cannot be done so as to defeat the suit of a creditor, who commenced his action before the bought-up claims were actually applied in extinguishment of the stockholder's personal liability, and whilst the stockholder held them, as transferee, open against the bank, he not having surrendered or canceled them until after the action was brought. When a stockholder is sued as such, and he defends on claims against the bank purchased by him, his legal disability as a director to purchase at a discount may be urged by the plaintiff in reply, without any allegation to that effect in the pleadings. *Holland v. Heyman & Bro.*, 60 Ga. 174.

1492. When the charter of a corporation provides that, in case any subsequent increase of the capital of the concern is authorized, notice of sixty days shall be given of such increase, within which time the stockholders shall have the privilege of taking additional shares, proportioned to the amount of their stock, and that any shares, not taken at the expiration of that time, may be disposed of by the directors for the benefit of the association. *Held*, that in order to entitle a stockholder to demand said additional shares, it must appear that he applied for the shares, and paid over or tendered the money necessary to purchase the same before the expiration of the sixty days, or before the expiration of any additional delay, which may have been given by the corporation to enable the stockholders to exercise said privilege. *Mrs. Emily L. Hart, et al. v. St Charles Street Railroad Co.*, 30 La. 758.

1493. A certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is in the hands of a third party presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. The holder of the certificate may fill up the letter of attor-



ney, execute the power, and thus obtain the legal title to the stock. And such a power is not limited to the person to whom it was first delivered, but enures to each *bona fide* holder into whose hands the certificate and power may pass. Mere knowledge on the part of a purchaser that an executor or administrator is dealing with the assets in a fiduciary capacity, is not enough to raise suspicion or to put the party on inquiry, for the reason that it is to their primary duty to dispose of the assets and settle the estate. A sale and transfer by them is ordinarily in the line of their duty. The common duty of a trustee is not administration or sale, but custody and management for his *cestuis que trust*. *Prall v. Tilt*, 28 N. J. Eq. 479.

**1494.** By the Act of 1872, ch. 325, § 59, all the stockholders of a corporation are severally and individually liable to the creditors of the corporation of which they are stockholders to an amount equal to any unpaid subscription held by them respectively. If one stockholder is required to pay a debt due by the corporation he is entitled to contribution from all the other stockholders whose subscriptions are unpaid. If any stockholder who has not paid up his subscription claims to be a creditor of the corporation, his unpaid stock is liable for the debt, and he cannot recover from another stockholder the full extent of his claim. Where a stockholder, who is a creditor of the corporation, seeks to recover his debt from another stockholder who has not paid up his subscription, the plaintiff must aver and prove that he has paid up his whole subscription to the stock, and also that the defendant was a stockholder of the corporation at the time the debt was contracted, and that he has not paid up his subscription. In an action against a stockholder of a corporation who has not paid up his subscription to recover a debt due by the corporation, wherein the plaintiff declares on a judgment recovered against the corporation as his cause of action, the defendant is entitled to a bill of particulars, in order that it may be informed whether the debt due by the corporation was contracted at the time the defendant was a stockholder. The judgment is the evidence of the debt due by the corporation, but it does not show *when* the debt was contracted. The date of the debt incurred is a necessary part of the evidence to fix the liability of the stockholder. *Weber v. Fickey*, 47 Md. 196.

**1495.** A president of a corporation is a trustee, and will not be permitted to create such a relation between himself and the trust property as will make his own interest antagonistic to that of his beneficiary. A president who has voluntarily purchased a small debt against the corporation, will be enjoined from levying an execution for the payment of a balance on the same, where he has already taken valuable property of the corporation in part payment thereof. *Brewster, et al. v. Stratman, et al.*, 4 Mo. Ct. Appeals (St. Louis) 41.

**1496.** Where a corporation is being defrauded by its officers, and by collusion the directors refuse to interfere to protect stockholders, or to sue, and will not seek redress in the corporate name, the individual stockholder who seeks relief for himself and others should so frame his bill as to set forth these facts, and should make the directors parties to the bills. *Griffin v. St. Louis Wine and Fruit Growers Asso., et al.*, 4 Mo. Ct. Appeals (St. Louis) 595.

**1497.** When it appears that the parties in charge of the property

and affairs of a corporation, as liquidators of the same, have been elected as such by the stockholders of the corporation, and their election has not been set aside, and no fear of fraudulent action on their part is alleged, no court is authorized to displace them, and appoint a receiver in their stead. *John F. Follett, et al. v. Spencer Field, President, et al.*, 30 La. 161.

**1498.** A legal by-law of a corporation which provides that no shares of its stock shall be transferred on its books, until the certificate thereof has been surrendered to its president, or shown to be lost, is binding on all its stockholders, and their heirs. Before the heirs of a deceased stockholder can compel the corporation to transfer shares, or pay accrued dividends to them, they must comply with the requirements of the by-laws. *State ex rel. Martin, et al. v. N. O. & Carrollton R. R. Co.*, 30 La. 308.

**1499.** Where the business of a church corporation is required by the articles of incorporation to be conducted by its officers as a board of trustees, the president and secretary have no power to execute a note binding upon the corporation without authority from such board. *Cattron, et al. v. The First Universal Society of Manchester*, 46 Iowa, 106.

**1500.** Corporation may be bound by a written contract, though a private seal of one of its officers was used instead of the corporate seal, and though no record may be found authorizing the officer to make the contract, if other evidence proves that he had such authority, or that the company satisfied his act afterwards. *Eureka Co. v. Bailey Co.*, 11 Wall. U. S. 488.

**1501.** A railroad corporation of one State cannot set up as against *bona fide* holders of its bonds, executed in due form, that a mortgage securing them was executed in another State, or by virtue of resolutions passed at a meeting held in such other State. *Galveston Railway v. Cowdrey*, 11 Wall. U. S. 459.

**1502.** Authority conferred by the trustees to erect a church building, however, would carry with it the power to contract debts necessary for that purpose, and notes executed therefor would be valid. *Ibid.*

**1503.** A corporation having been recognized in the exercise of its corporate functions by legislative enactments, all inquiry into its original organization is precluded. One who deals with a corporation in its corporate capacity cannot afterwards question collaterally the legality of the corporate existence. *Cowell v. Colo. Spg's Co.*, 3 Colo. 82.

**1504.** A foreign corporation does not become a domestic corporation by complying with the laws of this State, in pursuance of which a foreign corporation may do business here without liability attaching to the officers, agents and stockholders, upon the contracts of the company. *Cook v. Nayer*, 3 Colo. 386.

**1505.** The word "members," as used in the provision of the insurance act of 1853 (§ 107, chap. 463, Laws of 1853), providing that the company may sue or be sued by any of "its members or stockholders," is synonymous with "stockholders." *People v. Security L. Ins. Co.*, 78 N. Y. 114.

**1506.** Acts of a corporation which are not *per se* illegal or *malum*



*prohibitum*, but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them, dealing in good faith with the corporation, will be protected in a reliance on those acts. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

1507. Under its charter (chap. 816, Laws of 1868) the People's Safe Deposit and Savings Institution had power to loan its capital and funds, but was restricted in its investments to such securities as are specified in its charter (§ 11); this does not include commercial paper. *Pratt v. Short*, 79 N. Y. 437. Accordingly, *held*, that as the discounting of commercial paper is prohibited by statute (1 R. S. 712, §§ 3, 6), to any corporation not authorized by law so to do, and as paper so discounted is declared void, that a promissory note discounted by said corporation was void. *Pratt v. Short*, 79 N. Y. 437.

1508. But, *held*, that the illegal action of its directors in thus investing its funds did not work a forfeiture of the money loaned, and that this might be recovered, although the security was void. *Pratt v. Short*, 79 N. Y. 437.

1509. Defendant E., executed his bond and mortgage to secure the People's Safe Deposit and Savings Institution, for any indebtedness it had against the mortgagor, "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise." Subsequently said corporation loaned to the mortgagor various sums of money upon the discount of his notes, which expressed that the maker had deposited the bond and mortgage as collateral. In an action to foreclose the mortgage, *held*, that the notes were void, as the corporation had no power, under its charter, to loan money on personal security (chap. 816, Laws of 1868), and was prohibited by statute from discounting commercial paper (1 R. S. 712, §§ 3, 6); but that the corporation was authorized by its charter (§ 11) to invest in bonds and mortgages; that there was a loan which was within the condition of the mortgage; that the fact that the loan was made by way of discount, and upon the security of the notes, as well as of the mortgage, did not vitiate the latter; and that it was a valid security for the loan, and enforceable as such. *Pratt v. Eaton*, 79 N. Y. 449.

1510. A lease to a corporation is not terminated by its dissolution, and its covenant to pay rent does not thereupon cease to be obligatory. *People v. Nat'l Trust Co.*, 82 N. Y. 283. Its assets, upon its dissolution, become a fund for the payment of its debts, including those to mature as well as accrued indebtedness, and all open and subsisting engagements entered into by the corporation. *People v. Nat'l Trust Co.*, 82 N. Y. 283.

1511. A receiver of the dissolved corporation is authorized to retain out of its assets sufficient to cancel and discharge such open and subsisting engagements. (2 R. S. 470, § 74, *et seq.*) *People v. Nat'l Trust Co.*, 82 N. Y. 283.

1512. Until, therefore, the lessor has, by some act on his part, released or discharged the covenant to pay rent, he is entitled to payment thereof, as it accrues, from the receiver. *People v. Nat'l Trust Co.*, 82 N. Y. 283.

1513. Counterclaim not allowable in action for conversion. *F. S. Inst. v. Nat. Bank*, 80 N. Y. 162.

**1514.** A corporation is liable for its wrongful acts and omissions, and for the acts of its agents while engaged in the business of their agency to the same extent and under the same circumstances as natural persons. *F. Savings Inst. v. Nat. Bank of F.*, 80 N. Y. 162.

**1515.** The property of every corporation is to be regarded as a trust fund for the payment of its debts; the creditors of the corporation have a lien thereon and may follow it into the hands of the directors or stockholders. *Hastings v. Drew*, 76 N. Y. 9.

**1516.** A private corporation cannot repeal a by-law, so as to impair rights which have been given and become vested by virtue of the by-law; and this although the power is reserved by its charter to alter, amend or appeal its by-laws. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

**1517.** The consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation. Whether such be its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place. *Central Railroad & Banking Co. v. George*, 92 U. S. 665.

**1518.** Even if the directors of a private corporation have no authority to borrow money and mortgage its real estate for its repayment, yet if the stockholders ratify their action by approving the minutes of their proceedings before the loan is effected, and afterwards receive the benefit of the loan and pay interest thereon, the stockholders will be estopped from questioning the authority of the directors on bill to foreclose the mortgage. *Aurora Agricultural and Horticulture Society v. Paddock*, 80 Ill. 263.

**1519.** A custom or usage in a business will not bind the parties to a contract unless it appears they had knowledge of its existence, or that it is so general that they must be presumed to have contracted with reference to it. *Harris v. Tumbridge*, 83 N. Y. 92.



## DAMAGES.

1520. In a suit upon the first of several promissory notes given for the price of a chattel sold by plaintiff to defendant, where it does not appear that the notes were received *as payment*, nor in whose hands the remaining notes are, defendant cannot recover any excess of his damages, from breach of warranty of the chattel, over the amount due on the note in suit. *Reuter, et al. v. St. Louis, et al.*, 43 Wis. 693.

1521. If a plaintiff surrenders a note given for the price of goods sold, and proceeds under the common counts, he can only recover their real value upon the defendants showing a warranty, its breach, and the difference in the goods as warranted and as they really were. *Wilson, et al. v. King*, 83 Ill. 232.

1522. The rule of damages for negligence or delay in the transportation of goods by common carriers, is the difference between the market value of the goods at the time they should have arrived at the place of delivery and the time they did arrive there, with interest thereon, *as damages*, from that time. *Newell, et al. v. Smith, et al.*, 49 Rowell, 255.

1523. Where false representations are made on the sale of a security, the remedy of the purchaser is not limited to a recovery simply of the money advanced, if he would have received a benefit beyond that had the fact been as represented. *Grissler v. Powers*, 81 N. Y. 57.

1524. When goods are attached and sold by the sheriff, the proper measure of damages is the value of the goods at the time of the attachment, and not what they brought at auction. *Randall v. Greenwood*, 3 Mont. 506; also, *Wormall v. Reens*, 1 Mont. 627; *Harner v. Hathaway*, 33 Cal. 117; also, 9 Cox 562; *Bohm v. Dunphy*, 1 Mont. 333; *McGavock v. Chamberlain*, 20 Ill. 219.

1525. Where an examiner of title to real estate gives a certificate of title, he does not thereby become an indemnitor, but he is liable for any mistake arising from want of due care or diligence, or from ignorance of his business. An action for damages against him for false certificate is barred by the statute of limitations in five years from the delivery of the certificate, and not from the time when it is discovered that the certificate is untrue. *Rankin v. Shaeffer, Admr.*, 4 Mo. Ct. Appeals (St. Louis) 108.

1526. Negligence alone is not to be visited with punitive damages; wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences, is necessary to support such damages. *Kansas Pacific R'y Co. v. Lundin, Admr.*, 3 Colo. 94.

1527. In an action to recover the price of goods sold, the measure of damages is the difference between the value which the article sold would have had in the market at the time of the sale and delivery, if they had corresponded with the guaranty, and their actual value with the defects. *Smith, et al. v. Mayer, et al.*, 3 Colo. 207.

1528. If the party who has contracted to deliver a certain thing at a fixed price makes a tender of it at the proper time, and the party who has contracted to receive the thing refuses to receive it, the for-

mer may recover from the latter whatever damages are proved to have directly flowed from the latter's breach of contract. *Bartley v. City of New Orleans*, 30 La. 264.

1529. Recorder of deeds is liable in damages for a false certificate of researches. The liability of the recorder is to the party who asks and pays for the certificate, not to his assignee or alienee. *Houseman v. Girard Building Asso.*, 81 Penn. 256.

1530. An action under Civil Damage Act abates on death of defendant, and cannot be revived against his personal representative. *Moriorty v. Beecher*, 99 N. Y. 429.

### DEBTOR AND CREDITOR.

1531. B. gave a mortgage to secure a note of \$5,200. He afterwards gave to the mortgagees another note for \$5,500, with the privilege of two renewals upon making part payments at each renewal. B. did not request any renewal of the note. After its maturity he paid \$1,500 without any direction as to its appropriation, and the mortgagees applied it to the note of \$5,200. *Held*, on foreclosure of the mortgage, that as against a purchaser of the mortgaged premises under a judgment against B., he could not question such appropriation. *Paterson Sav. Inst. v. Brush*, 29 N. J. 119.

1532. A debt claimed by a wife against her husband, and first put in writing when his debts begin to jeopardize his future, must always be regarded with suspicion, and when attempted to be enforced against his creditors, must be rejected unless proved very clearly. *Post v. Stiger*, 29 N. J. 554.

1533. To constitute a disposition of property by a debtor with intent to defraud his creditors, the thing disposed of must be of value, out of which a creditor could have made a portion of his claim; it must have been transferred by the debtor, and this with intent to defraud. *Hoyt v. Godfrey*, 88 N. Y. 669. See Fraudulent Conveyances.

1534. Where the defendant's creditors signed a paper in the words: "We the undersigned agree, in consideration of one dollar paid us, to discharge H. Schulting from the legal payment of the money loaned to him, February, 1866; said Schulting giving his moral obligation to refund the money, in part or whole, as his means will allow in the future,"—*Held*, that the agreement was not an absolute discharge of the debt, but that, if the debtor acquired means in the future, and he refused to recognize the moral duty to repay the money, he would be liable in an action for the amount. The paper may be regarded as an agreement on the part of the creditors not to enforce their legal claims, so long as the debtor was without the means to pay. Where, after a creditor had signed such agreement, the debtor paid the creditor a portion of the original debt, and received a release from all claims and demands,—*Held*, that, notwithstanding such release, the creditor might maintain an action for the balance of the original loan if the debtor, at the time of obtaining release, concealed facts in regard to the value of his interest in certain property, which was of



large value, but which, before the release, he had stated to the creditor was of little or no value, it appearing that when the action was commenced the debtor had means to pay his debts. *Dambman v. Schulting*, 54 Howard, N. Y. 289.

1535. Debtor may, without providing for existing debts, create new debt, *bona fide*, and give a trust deed to secure it. *Coster v. Neal*, 24 Ga. 346.

1536. Where, in an agreement for an extension of the time of payment made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby. *Nat. Bank v. Bigler*, 83 N. Y. 51.

1537. Creditor who has loaned money to a corporation in excess of what constitution authorized it to borrow cannot have a decree for return of the specific money if used for public works, nor has he a lien on those works. *Litchfield v. Ballou*, 114 U. S. 190.

1538. Such an order does not import that the debt so acknowledged is only to be paid out of the fund against which it is drawn. *Ibid.*

1539. To constitute an acknowledgment of a debt, such as will take it out of the statute, the writing must acknowledge an existing debt, and must contain nothing inconsistent with an intention on the part of the debtor to pay. *Ibid.*

1540. Oral evidence, however may be resorted to, as in other cases of written instruments in aid of the interpretation. *Ibid.*

1541. Upon the insolvency of the corporation, (savings bank), the depositors stand as other creditors having no greater, but equal rights to be paid ratably out of the insolvent estate. *People v. M. & T. Sav'gs Inst'n*, 92 N. Y. 7.

1542. Claim which is illegal and absolutely forbidden by statute cannot lawfully be made a subject of arbitration. *Hall v. Kimmer*, 61 Mich. 269.

1543. A promise made to a creditor, not to debtor, is binding. And no case in which it is not to him, or to some person representing him, is within the statute. If, therefore, one, on an adequate consideration, promises a debtor to pay what the latter owes generally, or what he owes a particular person, this is valid though not in writing. The debt is not "another's," but the very person's to whom the promise is made. *Hawes v. Woolcock*, 26 Wis. 627; *Britton v. Angier*, 48 N. H. 420; *Eastwood v. Kenyon*, 11 A. & E. Eng. 438; *Cold v. Root*, 17 Mass. 229; *Tibbets v. Flanders*, 1 Gray Mass. 391.

1544. An order on a third person for the payment of money, in the absence of evidence showing a different relation between the drawer and payee is an acknowledgment in writing by the former of a debt within the statute of limitations (Code, Pro., § 110; Code, Civ. Pro., § 395) and continues the debt for a period of six years from its date. *Manchester v. Braedner*, 107 N. Y. 346.

1545. A mere general creditor of a firm, having no execution or attachment, has no lien whatever upon its personal assets. *Saunders v. Reilly*, 105 N. Y. 12.

1546. A creditor who receives from his debtor a certificate in writing, not negotiable, of the amount of his debt and sells the certificate to a third person, for value less than its nominal amount, thereby

authorizes the purchaser to receive the amount from the debtor, and cannot after the debtor has paid it to the purchaser, maintain any action against the debtor. *Looney v. District of Columbia*, 113 U. S. 258.

1547. Nor can the creditor who receives from his debtor a negotiable instrument of the debtor for the amount of his debt, and sells it for its market value to a third person, sue the debtor on the original debt. *Ibid.*

1548. Taking promissory note from one of several joint debtors or from third person is not a discharge of the debt unless such is the express agreement. *Tyner v. Stoops*, 11 Ind. 22.

1549. Suit may be brought on coupon, by owner, when detached from the bond to which they once belonged, and though the owner of the coupon be no longer owner of the bond. *The City v. Lamson*, 9 Wall. U. S. 478.

1550. The rule that a trader who is not able to pay all his debts in the usual ordinary course of business as persons carrying on trade usually do, is to be regarded as insolvent—approved, as a general rule. *Driggs v. Moore*, 1 Abbott, U. S. 440.

1551. Failure to pay a single debt when due, is not sufficient to establish insolvency. *Ibid.*

1552. One who is insolvent is disqualified from being appointed an administrator. *Levan's Appeal*, 112 Penn. 294.

1553. Insolvency is the state of a person who, from any course is unable to pay his debts in the ordinary or usual course of trade. *Ibid.*

1554. Money laid out and expended in favor of another, after his death, becomes a claim against his estate, and must be presented to his executor or administrator for allowance. *Rutherford v. Talent*, 6 Mont. T. 132.

1555. Nothing short of a clear, distinct, and unequivocal promise will revive a debt once barred by the Bankrupt Act. *Allen & Co. v. Ferguson*, 18 Wall. U. S. 1.

1556. An exchange of values may be made at any time, though one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act which prevents one insolvent from dealing with his property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or to give preference to any one, and do not impair the value of his estate. *Cook v. Tullis*, 18 Wall. U. S. 332; also, *Tiffany v. Boatman's Institute*, 18 Wall. U. S. 376.

1557. It seems that a "mutual credit" is a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to that debt as a means of payment. *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

1558. Claims against the estates of decedents, resting on mere oral testimony of declarations and admissions of the decedent are very dangerous, and not to be favored by the Courts. *Pollock v. Ray*, 85 Penn. St. 428.

1559. Any agreement with one creditor for an advantage to him over other creditors, made to induce him to join in the composition, or



required by him as a condition upon which he shall become a party to it, which is not provided for in the composition deed, and is not disclosed to the other creditors, is utterly void, and is incapable of being enforced or confirmed even as against the assenting debtor. A security given in pursuance of such a bargain or a subsequent promise of payment, is equally void with the antecedent agreement; and money paid by the debtor under such an agreement, in excess of the due proportion of such creditor's debt, may be recovered back, unless it be paid under such circumstances as to be regarded in law as a voluntary payment. *Crossley v. Moore*, 40 N. J. Law, 27.

1560. Debtors residing without this State are excluded *ex vi termini* from the operation of the Statute (R. S. p. 418, § 103) which provides that "Suits shall be commenced before justices in the township in which the debtor resides." Such non-resident debtors may be sued wherever found. *Wagner, et al. v. Hallock, et al.*, 3 Colo. 176.

1561. When a debtor, after being discharged from the obligations of his debts by a deed of composition with his creditors, voluntarily gives a security for a debt from which he is discharged by such composition and which is only due in conscience, such security may be enforced in a court of law. *Crossley v. Moore*, 40 N. J. L. R. 27.

1562. Where a debtor creates or appropriates a fund for the payment of a particular debt or lien, the duty of the holder of the fund is not performed by applying it to the payment of another debt; the debtor has the right to determine as to the application, and to have the application, when made, carried out. *Bennett v. Austin*, 81 N. Y. 308.

1563. Where a bankrupt owes a debt to two persons jointly, and holds a joint note given by one of them and a third person, the two claims are not subject to set-off under the Bankrupt Act, being neither mutual debts nor (without more) mutual credits. *Gray v. Rollo*, 18 Wall. 629.

## DEEDS.

1564. Where the distances and areas in the description of a deed do not correspond so as to describe the same quantity of land, the terms describing the distances will control that describing the area, and measure the quantity conveyed, in the absence of words indicating that the latter is to prevail. *Sanders, et al. v. Gooding, et al.*, 45 Iowa, 463.

1565. In deeds as well as notes, where words and figures are used to describe the same thing, and are contradictory, the description by words will govern. Thus, where a deed conveyed "lot number (142), one hundred twenty-four (124)," the lot conveyed was held to be 124 and not 142. *Bradshaw, et al. v. Bradbury*, 64 Mo. 334.

1566. No title passes by a deed for lands, without it has been delivered. A deed for land without the name of a grantee, when it is acknowledged and delivered, is invalid. There must be in every grant a grantor, a grantee, and a thing granted; and a deed wanting in either essential, is absolutely void. *Whitaker v. Miller, et al.*, 83 Ill. 381.

1567. In determining the dividing lines between tracts of land, courses, calls and distances, must give way to the marks on the

ground, and these marks control as well the description found in the patent as that found in the survey. The deed of the treasurer to the Commissioners of Warren County having been lost, its delivery and contents were properly proved by the books found in custody of the proper officers. *Watson v. Jones*, 85 Penn. St. 117.

1568. A deed otherwise absolute on its face, containing a clause, "subject, nevertheless, to the right of redemption of the property by the grantor" is a mortgage. *Mellon v. Lemon*, 111 Penn. 56.

1569. Although inadequacy of price, standing alone, is not enough to warrant a court of equity in setting aside an executed conveyance, yet, where there is inadequacy of price so gross that common judgment revolts at it, a court of equity will lay hold of the slightest additional circumstances of fraud or oppression, as a ground for declaring the transaction void. *Holmes v. Holmes*, 1 Abbott, U. S. 525.

1570. That a deed is ineffectual to convey title as to part of the lands described is of itself no ground for setting aside the deed, nor will a court of equity entertain a bill for compensation or damages, except as incidental to other relief, when there is an adequate remedy at law. *Jaeger v. Whitsett*, 3 Colo. 105.

1571. A condition in a deed, granting an estate in fee, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort in or upon the premises granted, or upon any part thereof, the grantor reserving the right upon condition broken to declare the deed void, and all right, title and interest in the premises in such event to revert to the grantor, and the grantee consenting to the condition and reservation, held to be a valid condition, binding upon the grantee, not repugnant to the estate granted, and that upon condition broken the grantor might maintain ejectment, upon proof of the breach, without previous entry, demand or notice. *Cowell v. Colorado Springs Co.*, 3 Colo. 82.

1572. A deed duly recorded is constructive notice of its existence and contents to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase, but not to other persons. *Gillett, et al. v. Gaffney, et al.*, 3 Colo. 351.

1573. The delivery of a deed implies its acceptance by the grantee, in the absence of fraud, artifice, or imposition. *Davenport v. Whisler & Shields*, 46 Iowa, 287.

1574. By the acceptance of the deed the contract of sale is executed and merged therein; any inconsistencies between its original terms and the deed are in general to be explained by the latter. *Ibid.*

1575. The holder under a quit-claim deed is not entitled to protection, as a *bona fide* purchaser without notice, against outstanding equities. *Springer, et al. v. Bartle*, 46 Iowa, 688.

1576. Although a deed is *inter partes*, a covenant therein made with a third person may be enforced by such third person by suit, if it clearly appears by the instrument that it was the intention to confer such right. *National Bank at Dover v. Segar*, 39 N. J. Law, 173.

1577. Ordinarily the date of a deed (admitted to have been delivered,) is *prima facie* evidence of the time of its delivery, but this presumption may be rebutted by testimony. *Cain v. Robinson*, 20 Kansas, 456.



1578. In the description in a deed courses and distances must yield to fixed monuments or to any points named which are capable of being certainly ascertained. *Sanders v. Eldridge, et al.*, 46 Iowa, 34.

1579. The recitals in a deed as to the consideration, are not conclusive, but the time and actual consideration may be shown by proof *aliunde*. *Fraley v. Bentley, et al.*, 1 Bennett's Dakota Rpts. 25.

1580. The placing on record of a deed to a party, such party being wholly ignorant of the existence of the deed, and not having authorized or given his assent to the record, does not constitute such a delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery. *Irvine v. Irvine*, 9 Wall. U. S. 617.

1581. Where a person has bought land and paid for it, the deed subsequently made in consequence does not confer a new title on him; but confirms the right which he had acquired before the deed was made. *Irvine v. Irvine*, 9 Wall. U. S. 617.

1582. Under the recording acts of Illinois, which enact that deeds shall take effect as against creditors and subsequent purchasers from the time that they are filed of record, it is necessary, in order to defeat a subsequent purchaser for value, of an unrecorded title, that he have notice of the previous conveyance or of some fact sufficient to put a prudent man upon inquiry. *Mills v. Smith*, 8 Wall. U. S. 27.

1583. When one makes a deed of land covenanting that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition enures to the grantee on the principle of estoppel. *Irvine v. Irvine*, 9 Wall. U. S. 617.

1584. A simple receipt not under seal "for forty dollars" for my share of the "lot," in dispute is not sufficient to divest the interest of the alleged vendor under the statute of frauds. *Mason v. Ammon*, 117 Penn. 127.

1585. The general rule in Texas for construing descriptions in grants of land is: that natural objects control artificial objects; that artificial objects control courses and distances; that courses control distances; and that courses and distances control quantity. *Ayres v. Watson*, 113 U. S. 594.

1586. If a deed is not so certified and acknowledged as to be competent evidence, yet if it was recorded, it was in Illinois, notice to subsequent purchaser. *Stebbins v. Duncan*, 108 U. S. 32.

1587. Where a party receiving an absolute deed covenants with grantor to reconvey the lands when the money which it was given to secure shall be paid, both instruments taken together constitute a mortgage. *Lanahan v. Seans*, 102 U. S. 318.

1588. A deed with power of sale, to secure a debt, whether made by debtor or third person, is in equity a mortgage, if right to redeem on payment of debt is retained. *Shillaber v. Robinson*, 97 U. S. 68.

1589. One claiming under a conveyance in form of a deed, but in fact given as a mortgage, cannot maintain ejectment against the grantor or any other person. *Shattuck v. Bascom*, 105 N. Y. 39.

1590. On proof that a deed is actually lost, not intentionally destroyed, in Illinois, certified copy from register's office may be used, though there is an error in the copy. How such error is proved. *Booth v. Tierman*, 109 U. S. 205.

## DEED OF TRUST.

**1591.** A deed of trust executed for the purpose of securing a debt, and to be void upon payment of the debt, and containing a power of sale upon default, is in legal effect a mortgage. The grantor retains an equity of redemption, which is subject to seizure and sale under execution as other equitable estates are under the statute. But where the grantor parts with his title absolutely, conveying it to the trustee to sell for the purpose of raising a fund to pay debts, it is properly a deed of trust, and no interest, legal or equitable, remains in the grantor. This opinion is held in *Sumner*, 533; *Story's Eq.*, sec. 1017; 20 *Ohio*, 469; *Ibid*, 572; 2 *Devarou*, 555; *Eaton v. Whitney*, 3 *Pick*, 484; *Bloom v. Rensselaer*, 15 *Ill.* 505. Approved in *Turner v. Watkins, et al.*, 31 *Ark.* 429.

**1592.** It is now finally and definitely settled by this court, that a deed of trust to secure the payment of a debt does not operate as an absolute transfer of the property on which it is executed to the trustee, upon the trust mentioned in the deed, defeasible upon conditions therein stipulated; but that such instrument is, in legal effect, a mere mortgage, with a power to sell. *McLane v. Paschal*, 47 *Texas*, 365.

**1593.** An actual delivery of a trust deed to the trustee therein named, who has no interest in the trust, is not required, but a delivery to the *cestui que trust*, together with the notes secured by it, will fully answer the requirements of the law. *Groeker, et al. v. Lowenthal, et al.*, 83 *Ill.* 579.

**1594.** The parties to notes secured by deed of trust have the right, in their mutual dealings, to treat them as unpaid, and as standing as security for future advances, and they will be good for such advances as between the parties and all others not prejudiced thereby. *Darst v. Gale, et al.*, 83 *Ill.* 136.

**1595.** Where the holder of notes secured by a deed of trust, becomes the purchaser of property at the trustees' sale, a mere indorsement of the amount of his bid on the notes will be a sufficient compliance with the power and terms of sale requiring it to be for cash. *Jacobs v. Turpin*, 83 *Ill.* 424.

**1596.** By virtue of the Act of May 28th, 1715, the words, "grant, bargain and sell" contained in a deed, are a covenant of *seisin*, a covenant for quiet enjoyment, and a covenant against incumbrances. *Memmert v. McKeen*, 112 *Pa.* 315.

**1597.** Provision in deed of trust by which possession was to remain in grantor until default made by him does not render the conveyance fraudulent as against creditors. *Wilson v. Russell*, 13 *Md.* 495.

## DEFENCE.

**1598.** Where a party is induced to enter into an executory contract for the purchase of lands by means of false representations on the part of the vendor, if, after discovery of the fraud, he accept a conveyance, he cannot set up the fraud as a defence in an action for the purchase money. *Vernol v. Vernol*, 18 *Sickels*, *N. Y.* 45.



**1599.** Where a corporation has fully performed a contract on its part to manufacture and deliver certain articles, it is no defence to an action brought to recover the purchase-price, that the contract was not within or incidental to its chartered powers, and privileges or the purposes for which it was created. *Whitney Arms Co. v. Barlow, et al.*, 18 Sickels, N. Y. 62.

**1600.** In an action upon two promissory notes, the answer alleged an agreement between the parties for a valuable consideration made at the time the notes were discounted, for the extension of the time of payment for six months, by giving renewal notes for those in suit, that at the maturity of the notes, defendants tendered new notes as agreed, which plaintiff refused to accept. *Held*, that this count in the answer set up a good defence. *N. Y. S. L. & T. Co. v. Helmer*, 77 N. Y. 64.

**1601.** Of usury, in action to foreclose a mortgage, when not affected by conveyance of land subject to mortgage. *K. L. Ins. Co. v. Nelson*, 78 N. Y. 137.

**1602.** Neither the fact that a check was dishonored when transferred, or that presentment for payment has been delayed, discharges the drawer. If dishonored, any defence thereto against the payee will be available against his transferee; but no presumption arises that overdue or dishonored paper is invalid. If loss results to the drawer by delay in presentment, that is matter of defence. *Cowing v. Altman*, 79 N. Y. 167.

**1603.** Where an order is drawn for a valuable consideration, payable out of a particular fund in the hands of a drawee, the drawee is bound after notice to apply the fund in payment, and voluntary payment thereafter to the drawer is no defence in action by payee. *Brill v. Tuttle*, 81 N. Y. 454.

**1604.** In an action against trustees of a savings bank for negligence, two of the defendants, after the commencement of the action, filed petitions for their discharge in bankruptcy and were discharged before judgment. *Held*, that such a discharge was not a defence to the action, as the claim, being for unliquidated damages occasioned by a tort, was not provable in bankruptcy and therefore not discharged. *Hun v. Cary*, 82 N. Y. 65.

**1605.** When discharge in bankruptcy of an attachment debtor no defence in action on undertaking given to discharge the attachment. *McCombs v. Allen*, 82 N. Y. 114.

**1606.** In action by State bank on note, the fact that it purchased note at a discount greater than lawful interest, not a defence. *A. S. Bank v. Savery*, 82 N. Y. 291.

## DEFINITIONS.

**1607.** The term "mariners" includes a purser permanently attached to a vessel; and a theft or embezzlement by him is included in the term "barratry." *Spinetti v. Atlas S. S. Co.*, 80 N. Y. 71.

**1608.** Where the holder of a promissory note parts with the possession thereof to the maker, it is a "personal transaction" between them, within the meaning of section 399 of the Code of Procedure. *Van Gelder v. Van Gelder*, 81 N. Y. 625.

## DEPOSITS.

**1609.** The fact that the principal in a note payable to a bank has funds on deposit in the bank after the maturity of the note, and before suit on the note, exceeding the sum due thereon, and the bank does not appropriate the same to its payment, does not discharge the surety. *Voss v. The German-American Bank of Chicago*, 83 Ill. 599.

**1610.** Special deposits withdrawn by person having authority, though bank acted without knowledge of that fact, not liable to answer for. Where deposits consist of stocks and bonds, written authority indorsed on certificate, to pay out the dividends and coupons, no authority to surrender stock and bonds. *Chat. Nat. Bank v. Schley*, *Guardian*, 58 Ga. 369.

**1611.** M., shortly before his death, indorsed a bank deposit-receipt and delivered it to S., stating that it was for his (M.'s) niece, K.; S. indorsed the document, and, after M.'s death, presented it to the bank, who transferred the amount to S. against the bank. *Held*, that the deposit-receipt was not a negotiable instrument passing by indorsement; that there was no equitable assignment of it; that if the transaction constituted S. an agent of M., his authority was revoked by M.'s death; that the transaction did not amount to a *donatio mortis causâ*. *Adm'r of D. R. Moore v. Ulster Banking Co.*, 2 Irish Reports, Common Law Series, 512.

**1612.** In an action against a savings bank, on an account annexed, to recover the amount of a deposit, the book of deposit is admissible in the evidence, at least to show the amount of the plaintiff's money received by the defendant, and it does not appear to have been admitted for any illegal purpose, although the book contained printed conditions of deposit and payment. *Brown v. Abington Savings Bank*, 119 Mass. 69.

**1613.** A safe deposit company contracted with a depositor to "keep a constant and adequate guard over and upon the safe" rented by him. A number of bonds deposited therein were found to be missing: *Held*, that the company was bound to make some explanation for the absence of the bonds. *Held*, further, that the question whether the company was guilty of negligence was properly left to the jury. *Safe Deposit Co. v. Pollock*, 85 Penn. St. 391.

**1614.** A certificate of deposit, payable on the return thereof properly indorsed, is in legal effect a promissory note, payable on demand; and the principle applicable to such notes should be applied to these certificates. The claim that a certificate of deposit and a certified check are in legal sense the same thing, are governed by the same rules, and that no mere lapse of time will render such check or certificate past due or dishonored, is held not well founded. Certificates of deposit are not intended for long circulation, or for more than a temporary convenience, and to hold that any ostensibly demand paper could be circulated or used as bankbills, would be contrary to the general policy of our banking laws. *Tripp v. Curlessius*, 36 Mich. 494.

**1615.** A depositor in a savings bank, who is also a debtor to the bank, as a borrower of its funds, cannot, upon the insolvency of the



savings bank set-off the amount of his deposit against his indebtedness. *Osborn v. Byrne*, 43 Conn. 155.

**1616.** Where, however, a person indebted to a savings bank as a borrower, deposited an amount less than the debt, intending to use the money so deposited for a payment upon the debt, it was held that the amount deposited could be set off against the debt. *Ibid.*

**1617.** A savings bank is an agent for the depositors, receiving and loaning their money, and its losses are their losses, and are to be borne by them equally, according to their interest. *Ibid.*

**1618.** A bank of deposit has no power to apply a money deposit in its possession, belonging to the maker of a promissory note payable at such bank, to the satisfaction of such note, without his consent. *Scott v. Shirk*, 60 Ind. 160.

**1619.** When a bank receives deposits it undertakes to pay the depositor's check to the holder, if it has funds of the depositor sufficient to pay the check when presented; and this promise or agreement between the bank and its depositor, implied from the universal usage or custom of the business world enures to the benefit of the holder of the check, and if he presents it to the bank for payment, and payment is refused, the bank having funds of the depositor sufficient to pay it when presented, he may sue and recover of the bank upon the check. *McGrade v. German Savings Inst.*, 4 (St. Louis) Mo. Ct. Appeals, 330.

**1620.** A depository may show by parol evidence that the money deposited with him, and for which he had given his written receipt, was composed of certain bank bills. A depository is not liable for any depreciation in the value of bank bills deposited with him, unless it appears that the depreciation has proceeded from his fault, or has occurred after he was in default to restore the deposit. *Uranie Berard v. Vincent Boagni*, 30 La. 1125.

**1621.** Special deposit of bonds was left by a customer with the cashier of a national bank for safe keeping, with the knowledge of its directors, and the bank gave a receipt therefor. The bonds were subsequently stolen and the bank offered no satisfactory explanation of the manner of the theft. *Held*, that there was sufficient evidence of gross negligence to be submitted to the jury. *Bank v. Graham*, 85 Penn. St. 91.

**1622.** The rule that where money has been deposited with a bank, the bank where the deposit is made becomes the owner of the money and consequently a debtor for the amount, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value, does not apply where the thing deposited is not money, but a commodity, such as confederate notes, and it was agreed that the collections should be made in like notes. *Planters' Bank v. Union Bank*, 16 Wall. U. S. 483.

**1623.** What is sufficient evidence of demand and refusal to authorize submission of question to jury. *Tuttle v. Hazard*, (Mem.) 86 N. Y. 628.

**1624.** A depositor in a bank, who sends his pass book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound personally or by an authorized agent, and with due diligence to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any

errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice he cannot afterwards dispute the correctness of the balance shown by the pass book. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96.

1625. If a depositor in a bank delegates to a clerk the examination of his written up pass book and paid checks returned therewith as vouchers, without proper supervision of the clerk's conduct in the examination, he does not so discharge his duty to the bank as to protect himself from loss, if it turns out that without his knowledge the clerk committed forgery in raising the amount of some of those checks, and thereby mislead the bank to its prejudice, in spite of due care on the part of its officers. *Ibid.*

### DEMAND.

1626. Where, by the terms of a contract between vendor and vendee, the purchase-price of merchandise was to be paid in cash or the notes of third parties, at the option of the vendee, the indebtedness of the vendee accrued upon the delivery of the merchandise, and a demand for the notes need not be shown to entitle the vendor to a right of action thereon. *The Davis Sewing Machine Co. v. McGinnis, et al.*, 45 Iowa, 538.

1627. To enable a party to recover in an action upon a due bill payable in specific property, no time being mentioned, a demand is necessary. Otherwise when time and place are specified. A personal demand elsewhere than at the place designated in a due bill for the delivery of personal property is good, unless met by an offer to pay at the designated place. A right of action, which has accrued by reason of a refusal upon demand to deliver specific articles of property according to contract is waived by a subsequent demand if the party upon whom the demand is made indicates a readiness to deliver according to contract. *Widner v. Walsh*, 3 Colo. 548.

1628. Where one receives from a municipal corporation warrants drawn upon its treasurer, presentation to that officer, or the allegation in the declaration of facts which will excuse presentation, is necessary before an action can be maintained on the warrants. *City of Central v. Wilcozen*, 3 Colo. 566.

1629. A mere demand for the payment of the balance of purchase-money cannot be regarded as an acquiescence in the wrongful delivery of an escrow, and as depriving the vendor of his right to rescind. *Hamill v. Thompson, et al.*, 3 Colo. 518.

1630. The obligation of a party to refund money, voluntarily paid to him by mistake, can arise only after notification of the mistake, and demand of payment. *Southwick v. First Nat. Bank*, 84 N. Y. 420.

1631. Where a demand is necessary it is not excused by showing that defendant would not probably have complied if one had been made; and it matters not that defendant, on the trial, contests plaintiff's right to recover. *Southwick v. First Nat. Bank*, 84 N. Y. 420.



## DEVISE.

**1632.** Under the provisions of the Revised Statutes (2 R. S. 57, § 5) declaring that every will which in express terms devises or in other terms denotes an intent to devise all the testator's real estate, "shall be construed to pass all the real estate which he was entitled to devise at the time of his death," such a will operates upon lands acquired after the making of the will. *Byrnes v. Baer*, 86 N. Y. 210.

## DISCOUNT.

**1633.** The discount of a draft, at legal interest, is not rendered usurious, by reason of any intended lawful use of the paper by the party discounting, though he may thus realize more than legal interest. *Farmers' & Mechanics' Bank v. Parker*, 37 N. Y. 148.

**1634.** Discounting a note at the rate of seven per cent. is not usury. *Manhattan Co. v. Osgood*, 15 Johns. 162; *Bank of Utica v. Phillips*, 3 Wend. 408; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Kent v. Walton*, 7 Wend. N. Y.; *Anderson v. Schenck*, 1 N. Y. Leg. Obs. 107; *Marvine v. Hymsers*, 12 N. Y. 223.

**1635.** In taking interest in advance, in discounting a note, it is lawful to include the three days of grace in the computation. *Bank of Utica v. Wager*, 2 Cow. N. Y. 712.

**1636.** If a bank, on discounting a bill, at the request of the party, give a certificate of deposit, payable at a future day, it is not usury. *Knox v. Goodwin*, 25 Wend. 643; *Cayuga County Bank v. Hunt*, N. Y. 2 Hill, N. Y. 635.

**1637.** If a person give his creditor a note for part of the debt, which is discounted at more than legal interest, he cannot plead usury to an action on it. *Handy v. Empie*, N. Y. 1 How. Pr. 46.

**1638.** The purchase of one's note at a discount is not usurious. *Staley v. Kneeland*, Clarke, Ch. N. Y. 30.

**1639.** Ante-dating a note, bearing interest, as of a date when the money was due on the contract, does not render the note usurious. *Powell v. Jones*, 44 Barb. N. Y. 521.

## DIVIDENDS PLEDGED.

**1640.** A bank has the right to hold a cash dividend as pledged for the indebtedness of the shareholder to the bank. A bank had sued an overdue note of a stockholder, discounted by the bank, and attached his shares. During the pendency of this action, the stockholder demanded payment of the dividends declared upon the attached shares, which was refused. He subsequently settled that suit, and then without renewing his demand brought the present action for his dividend. Held, that it could not be maintained. *Hagar v. Union Nat. Bank*, 63 Me. 509.

## EMBEZZLEMENT.

**1641.** In order to sustain an indictment, under the statute relating to embezzlements (2 R. S. 678, § 59, as amended by chapter 207, Laws of 1874), against the treasurer of a corporation, for the alleged conversion to his own use of money of the corporation, it must be made to appear that the money in question came into his possession or under his care by virtue of his office. *Bartow v. People*, 78 N. Y. 377.

**1642.** Where an indorsement of a negotiable bill purports to pass the title thereto from the indorser, and to divest him of all beneficial interest therein, a consideration for the transfer is presumed, and the burden of proving want of consideration rests upon the party alleging it. *Hook v. Pratt*, 78 N. Y. 371.

**1643.** The restrictive indorsements which are held to negative the presumption of a consideration, are such as indicate that they are not intended to pass title, but merely to enable the indorsee to collect for the benefit of the indorser. An indorsement to one person for the benefit of another affords no such indication. *Hook v. Pratt*, 78 N. Y. 371.

## ENDORSEMENTS.

**1644.** The general rule in this State and elsewhere is, that the indorsement of a negotiable note or bill before maturity by the payee, creates an absolute warranty to the immediate and subsequent indorsement; among other things, that the maker or acceptor will pay it on due presentment when it is due, but that if he does not, the indorser will pay it if due notice is given him of such dishonor; and evidence of a contemporaneous or subsequent parol contract varying or contradicting such indorsement as to any of its terms is not admissible. *First Nat. Bank of St. Paul v. Nat. Marine Bank of St. Paul*, 20 Minn. 63.

**1645.** An indorsement on a promissory note, "assigned to" A., made in the name of the payee, is one upon which the latter is liable *prima facie*, as indorser. *Henderson v. Ackelmire*, 59 Ind. 540.

**1646.** Where the indorser of a note was released from liability by the fact that the note was not protested, but afterward went to the lawyer of the holder and promised to pay it, and again subsequently sent a letter to the same effect, which was destroyed,—*Held*, on action brought, that his promise to the lawyer was as binding as if made to the holder, and, moreover, could be proved by parol evidence. *Johnson v. Geoffrion*, 7 L. C. J. 125; 13 L. C. R. 161; C. C. 1863.

**1647.** The fact of an indorser having been appointed to a temporary office in a place where he went alone, leaving his family for some time afterward in the domicile occupied by him at the time of his appointment, did not effect a change of domicile, and notice of protest left at such domicile was good and sufficient to render him liable for the payment of the note. *Ryan, et al. v. Malo*, 12 L. C. R. 8 Q. B. 1861; 82 & 2328 C. C.



1648. If the indorser desires the benefit of any security held by the creditor, he must first pay the paper, assert his right of subrogation, and himself enforce the security. *First Nat. Bank v. Wood*, 71 N. Y. 405.

1649. The fact that other parties occupy the same position, and are interested with him in enforcing the security, is immaterial. He is only entitled to such benefit as is conferred by the security as it is, and beyond this, has no valid claim for protection. *Ibid.*

1650. The holder of a note to order under protest, who has received an account from the maker and another note as security for the first, does not lose his recourse against the indorsers of the first note who have given their assent to the transaction, notwithstanding the insolvency of the maker of the first note. *Woodbury v. Garth*, 9 L. C. R. Eng. 438, Q. B. 1858.

1651. A draft, drawn by a New Jersey bank upon a New York bank, which had been altered by some unknown person by changing the date and name of payee, and raising the amount, was presented at plaintiff's banking-house by a stranger, who applied for the money thereon. P., defendant's testator, came to the bank with the stranger and put his name upon the draft "as an indorser." Plaintiff purchased the draft and paid the amount of it to the stranger. The draft was sent by plaintiff to its correspondent in New York, and it was paid by the drawee, but upon discovery of the forgery, the money was refunded. In an action upon the indorsement it was not denied that the person presenting the draft was the payee appearing upon its face at that time, and there was no finding that he was not. *Held*, that as P. was, to the knowledge of plaintiff, simply an accommodation indorser, his indorsement was not a guaranty of the genuineness of the draft; that the fact of the forgery could not be presumed to be within his knowledge; that upon the facts found he had all the rights and privileges of an indorser and was subject only to the obligations that relation imposed; and, as he was not charged according to the law-merchant, *i. e.*, by presentation for payment, refusal and notice of non-payment, he was not liable. *Sus. Val. Bank v. Loomis*, 85 N. Y. 207.

1652. Giving a definite extension of time to the maker of a note upon consideration of interest paid in advance by him without the assent of an indorser will release him from liability. *Siebeneck v. Anchor Savings Bank*, 111 Penn. 187; *Lime Roch Bank v. Mallett*, 34 Me 547.

1653. The making and dating of a promissory note at a particular place is not equivalent to making it payable there, nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker if it be known, or if by due diligence in making inquiry it could be ascertained. *Oxnara v. Varnum*, 111 Penn. 193; *Duryee v. Dennison*, 5 Johns. N. Y. 248.

1654. A promise to pay, by the indorser, after default of payment by the maker, not only dispenses with proof of presentment and notice, but throws on the defendant the burden of proving laches of the holder, and that the defendant was ignorant of the facts at the making of the promise. *Ibid.*; also, *Allen v. Bratton*, 47 Miss. 129; *Woodruff v. Hill*, 111 Mass. 310.

**1655.** An indorser of a promissory note is not estopped from setting up usury as a defence thereto by a certificate or affidavit made by him, to the effect that the note is business paper, given for a full consideration and subject to no defence of usury or otherwise, where it appears that where the note was transferred to the holder he had knowledge that it was indorsed for the accommodation of the maker, and had its inception when so transferred. *Lewis v. Barton*, 106 N. Y. 70.

**1656.** Indorser on note receiving mortgage as security, being obliged to pay note, can assign the mortgage and paid note, and assignee can recover. *Bendey v. Townsend*, 109 U. S. 665.

**1657.** When the last indorser has paid the amount of a judgment on the note, with interest and costs obtained at the suit of the holder, —*Held*, such payment being made subsequently to the institution of another action on the same note by the same holder against the maker and payee, such indorser has a right to intervene in the latter action, and obtain a judgment in his own favor against the maker and payee of a note. *Mitchell, et al. v. Brown, et al. & Baillie*, 15 L. C. R. 425, C. C. 1865 Eng.

**1658.** An accommodation indorser of promissory notes discounted by a bank cannot, in the absence of any special equities, require the bank first, to resort to a mortgage on real estate held by its collateral before maintaining an action upon the indorsement. The fact that the avails of the note are passed to the credit of the maker to take up other paper, does not affect the rights of the bank in this particular. *First Nat. Bank v. Wood*, 71 N. Y. 405.

**1659.** When an indorser of a promissory note, who has been discharged from liability by failure of the holder to make demand and give notice of non-payment, with full notice of the laches of the holder, unequivocally assents to continue his liability as though due protest had been made, he waives his right to object, and stands in the same position as if the proper steps had been taken to charge him. *Ross v. Hurd*, 71 N. Y. 14.

**1660.** In an action by the bearer, who was also the maker, against an indorser, the latter pleaded that he indorsed the note simply as an accommodation, and on the understanding that the plaintiff should place his name above his (the defendant's) as second indorser. On appeal from a judgment against the defendant, —*Held*, reversing the judgment of the court below, that the order of signature by indorsement of a note was a mere presumption of the undertaking of the indorsers with respect to one another, and that this presumption could be destroyed by proof of a contrary understanding, and that, accordingly, in the case submitted, the indorsement made by one of the indorsers, with the express condition that such indorsement would be preceded by the indorsement of a third party, who was made acquainted by the bearer of the note with the conditions of the indorsement, could not give to such third party a right of action against the indorser, the bearer of a note being considered in such case the agent of the indorser. *Day v. Sculthorpe*, 11 L. C. R. 269, Q. B. 1861 Eng.

**1661.** A bill of exchange drawn in England and payable in Spain, was indorsed in England by the defendant to the plaintiff, who indorsed it to M., residing in Spain. Acceptance having been refused, a



delay of twelve days occurred before M. wrote to inform the plaintiff of the dishonor. On receipt from M. of the notice of dishonor, the plaintiff gave immediate notice to the defendant. No notice of dishonor by non-acceptance is required by the law of Spain. *Held*, that the plaintiff was entitled to recover the amount of the bill. *Horne v. Rouquette*, 3 Eng. Law. Rep., Queen's Bench Div. C. A. 514.

**1662.** Indorser of a promissory note after its maturity and his liability on it has become fixed, joined with the maker of the note in a bond giving further time, at his request. *Held*, that he was surety on the bond and not a principal. *Merriken v. Godwin, et al.*, 2 Del. 236.

**1663.** In an action against an indorser, who was a banker, plaintiff's evidence was to the effect, that, prior to the maturity of the note, plaintiff and defendant had some conversation in regard to extension of time, but no arrangement was made; after the discharge of the defendant by failure of demand and notice, plaintiff and K., the maker, went to defendant's bank to arrange an extension of time. K. asked plaintiff if he desired a new note. Plaintiff replied that if the parties agreed he would let the note stand; defendant said, "then I waive protest," and plaintiff thereupon agreed to an extension. *Held*, that the evidence was sufficient to authorize a finding that the defendant, with knowledge, assented to continue his liability; and that a non-suit was error. *Ross v. Hurd*, 71 N. Y. 14.

**1664.** In an action against an indorser, — *Held*, that the defendant had a right to set up in compensation against the holder all sums of money, which the holder had been paid, by, or in which he had become indebted to the maker since the protest of the note, and that the salary of a bank officer paid by quarterly instalments, ought in this way be set up against the bank by an accommodation indorser. *The Quebec Bank v. Molson*, 1 L. Canada, R. 116, 1851.

**1665.** The transfer of a note by indorsement carries with it the mortgage and frees the mortgage in the hands of a good faith holder, like the note, of any equities between the original parties. *Updegraff v. Edwards, et al.*, 45 Iowa, 513.

**1666.** Waiver of demand and notice may be made by parol. *Smith v. Lownsdale*, 6 Oregon, 78.

**1667.** The indorsee cannot maintain suit against the indorser or assignor of paper not commercial, where the amount exceeds fifty dollars, without averring and proving suit against the maker to the first term, prosecuted to judgment and return of "no property," or some sufficient excuse for not having done so. All contracts for payment of money, except instruments governed by the commercial law, are subject in the hands of the assignee to all payments, discounts, and set-off made or had prior to notice of assignment, and to any defence which could have been made against the assignor or indorser. *Cook v. Citizens' Mutual Ins. Co.*, 53 Ala. 37.

**1668.** A promise to pay, made after maturity, with knowledge that demand and notice of non-payment had not been made, removes the effect of any negligence in making demand or in giving notice. An indorser who has taken sufficient security to protect himself against possible loss waives his legal right to require proof of demand and notice. *Smith v. Lownsdale*, 6 Oregon, 78.

**1669.** Indorser of a promissory note is a competent witness to

prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made. *Davis v. Brown*, 94 U. S. 423; *Bank of United States v. Dunn*, 6 Pet. 51, explained and qualified.

1670. Delay granted to the maker of a promissory note by the holder, without the knowledge of the indorser, does not discharge the latter. *Massue v. Crebassa*, 7 L. C. J. 211, S. C.; 1961 C. C. Eng.

1671. If the indorser of a promissory note, after it falls due, promises to pay the same, with a knowledge that the holder has failed to give notice of non-payment and make demand of payment, the promise dispenses with the necessity of demand and notice. A statement made by the indorser of a promissory note, after it falls due, to the holder, that he is responsible for the note, is in effect a promise to pay it. If the payee of a promissory note indorses it in blank, and delivers it to another, the note becomes payable to the transferee, not as indorsee, but as bearer. The fact that the payee indorses a note in blank, and delivers it to a person who afterwards reassigns it to him without recourse, and that the payee then delivers it to another person, do not change the rule. *Curtis v. Sprague*, 51 Cal. 239.

1672. Whenever a negotiable promissory note is drawn up and is signed by the maker, and is then indorsed in blank, first by the payee and then by a third person, and the note is then delivered by the maker for a sufficient consideration to still another person, who thereby becomes the holder thereof, the presumption in such case should be, and is, that the payee and said third person intended to assume, and did assume, all the rights and privileges, as well as all the obligations and liabilities, usually assumed by indorsers of negotiable instruments. When a note is executed, indorsed and delivered in the foregoing manner, the indorser will be discharged unless due demand of payment is made, and due notice of non-payment given to the indorsers. *Bradford v. Pauly, et al.*, 18 Kansas, 216.

1673. A stranger who indorses negotiable paper at the time it is made, is *prima facie* liable to the payee as original promisor or as guarantor, as the payee may at any time elect. But it may be shown by parol evidence that he intended to bind himself only as guarantor, or even as second indorser; and if so shown by such evidence, he can only be held bound according to the original understanding. *Burton & Co. v. Hansford, et al.*, 10 West Va. 470.

1674. After a note under seal from Frow to Wilson was due, at the request of Frow, Wilson agreed to continue it, if Frow would give security. Belford agreed with Wilson to become surety, and there being no room at the bottom of the note to sign his name, Belford said it would do to sign on the back, and in signing thus, said to Wilson, he understood he was "going on the note as security." Held, this was within the Statute of Frauds, and Belford was not liable. The indorsement, the testimony being parol, did not take it out of the statute. Indorsement in blank of notes not negotiable is not evidence of a written promise to pay under the statute. *Wilson v. Martin*, 74 Penn. St. 159.

1675. The omission to give an indorser notice of the non-payment of previous instalments, as they fell due on a promissory note does



not effect his liability for a later instalment, of the non-payment of which he has been duly notified. Notice to the indorser of a promissory note of a demand made upon the maker for an instalment then due and for the interest due upon the note (some of the previous instalments and interest being still unpaid) and of his non-payment, is sufficient to charge the indorser, and is not invalidated by adding that the holder looks to him for the payment of the instalment and of the interest due upon the note. In an action against the indorser of a promissory note to recover an instalment due thereon, it appeared that when previous instalments had become due, of the non-payment of which the indorser had not been duly notified, the indorsee had applied the proceeds of a mortgage, given by the maker to secure the payment of the note, to such instalments. *Held*, that the indorsee had the right so to apply them. *Fitchburg Mutual Fire Ins. Co. v. Davis*, 121 Mass. 121.

**1676.** Where the maker of a promissory note furnishes to the second indorser money to pay the note, a trust is created in favor of the first indorser, as well as the holder, to have the fund applied in payment of the note. Where two persons successively indorse a promissory note for the accommodation of the maker, and the maker furnishes to the second indorser at the time of his indorsement, with the means to pay the note, without the knowledge of the first indorser, the maker and second indorser have a right to subsequently agree that the means shall be applied to another purpose; but if the second indorser promises the first that such means shall be applied to the payment of the note, and thereby induce him to be inactive, which results to his injury, such promise creates an equity in favor of the first indorser which will sustain an action. *Price v. Trusdell*, 28 N. J. Eq. 20.

**1677.** The indorsee of a negotiable bill or note, in the absence of proof of fraud, is presumed to be a *bona fide* holder for value—this presumption is not repelled merely by proof that the paper as between the immediate parties was without consideration, and was made, indorsed or accepted by one for the sole accommodation of the other. Where, therefore, in an action by an indorsee before maturity against the acceptors of a bill, the defence was that the acceptance was without consideration of the drawer, and that it was discounted by plain-tiffs for the drawer at a usurious rate of interest, *held*, that the burden was upon defendants to show the amount paid by plaintiffs for the bill, and in the absence of any evidence upon the subject, that plain-tiffs were entitled to recover. *Harger v. Worrall*, 69 N. Y. 370.

**1678.** Notice of dishonor to indorser, certificate of notary, in connection with his testimony that it is genuine, and that, though he has no recollection of the facts stated therein, he is satisfied of their truth, because he would not have certified them had he not been convinced of their truth at the time, admissible to establish, notice, mail used as means of conveying, and it is in evidence that notice did not in fact reach indorser, plaintiff must show that notices were properly directed, stamped, etc. Evidence that notary "served indorsers with notice" by depositing said notices in the post office, in the city of Atlanta, with no statement as to direction, payment of postage, etc., insufficient where indorsers testify that they did not receive notice. *Allen & Co. v. Georgia National Bank*, 60 Ga. 347.

1679. Agreements of indorsee with a stranger to give time to the acceptor does not discharge the maker. *Frazer v. Jordan*, X C. ii. 303; 8 C. & B. 303 (Eng. Com. Law.)

1680. That where a party who is a stranger to the note indorses the name before delivery, the law does not define the character of the contract or obligation created by such indorsement, and, therefore, parol evidence will be received to determine what the contract was—whether that of a guarantor or maker—and that the contract may not, because of its ambiguity, be defeated; and whereas, in this case, the law defines the nature of the contract, and the manner in which the indorser may be held by proper legal steps, the court will not receive parol evidence to prove another and different contract from that defined by law. *Ibid*; also, *Levering v. Washington*, 3 Minn. 323; *Kern v. Von Phul*, 7 Minn. 426; *First National Bank v. National Marine Bank*, 20 Minn. 63.

1681. Where indorsee of a bill of exchange in sets alleges loss in transmission for acceptance, and demand for other sets from prior indorser not immediate as to him, and also alleges the non-delivery by said indorsee and consequent loss, he cannot recover. Such indorsee is bound to apply either to the drawer or his immediate indorser. Non constat that if he had applied to them there would have been a loss. *Pinard v. Klockmann*, CX. iii. 388; 3 B. & S. 388 (Eng. Com. Law.)

1682. An indorser of a promissory note, even though it be an accommodation note, is not one; but is a principal debtor if the note be not paid and proper steps have been taken to fix his liability. *Ross v. Jones*, 22 Wallace, (U. S.) 576.

1683. To charge an indorser of a note as maker, it is necessary to show specifically that he put his name upon the back of the note before delivery to the payee. *Best v. Hoppie*, 3 Colo. 137.

1684. It being necessary for the payee to indorse the note in order to make it negotiable paper, he must be treated as first indorser without regard to the time of his indorsement or the locality of his name, on the note. A second indorser may maintain an action against the first for money paid on the note. *Cogswell v. Hayden*, 5 Oregon, 22.

1685. The indorser of a promissory note after it falls due, with a contract, and as additional security to prevent legal proceedings from being taken against the payee and indorser, is that of a grantor, and, even if based on a valid consideration, is fatally defective, unless the writing express the consideration. *Crooks v. Tully*, 50 Cal. 254.

1686. The guarantor of a promissory note is entitled to notice of non-payment. *Ibid*.

1687. Indorsee sold a negotiable promissory note, and indorsed it without recourse. Held an implied warranty that the note was valid. *Hannum v. Richardson*, 48 Vt. 508.

1688. The indorser of a promissory note, though fixed in his liability, by protest, is not entitled, as a creditor, to a share of the estate of the maker under an assignment for the benefit of creditors. Such an indorser is entitled only to be reimbursed payments actually made by him. The holder of the note can claim under the equity of the indorser, out of the assigned estate, only to the amount of payments so made by the indorser. *Farmer's Bank v. Gilpin, et al.*, 1 Del. Chancery, 409.



1689. The names of the payees appeared on the back of a note in the usual position of the first indorser, about three inches from the left end, and that of the defendant in the opposite direction, about the same distance from the right end of the note, so that the latter with reference to the former may be said to have been inverted. *Held*, that this irregular indorsement did not relieve the defendant of liability, as he could have recourse against the payees. *Arnol's Adm'r v. Symonds*, 85 Penn. St. 99.

1690. Indorsement upon a note, to the effect that the maker may use the principal after maturity by the payment of interest semi-annually, does not release the maker from the obligation of payment. *The Oskaloosa College v. Hickok*, 46 Iowa, 237.

1691. Upon a failure of the maker to pay the interest according to the terms of the indorsement, the principal of the note became due and payable. The subsequent acceptance of interest would not entitle the maker to an extension of time of payment, the interest thus paid being merely a partial payment of the note. *Ibid*.

1692. A person of unsound mind who signs as surety a note given for an antecedent debt, cannot be held liable thereon even though the person taking the note had no knowledge that the surety's mind was unsound. *Van Patton & Marks v. Beals & Hammer*, 46 Iowa, 62.

1693. Complaint against two defendants as joint makers of promissory note, payable at any bank in Savannah, one of whom signed on the face and the other on the back, unnecessary, in order to charge the latter, to allege protest and notice. *Hardy v. White*, 60 Ga. 454.

1694. A party indorsed a negotiable note for \$500, for the maker's accommodation. The maker then, by the use of chemicals, rendered the amount of the note invisible, wrote in a larger amount, and procured the note to be discounted at a bank as a note for the larger amount. Before the note came due, the fraud was discovered, and the original writing was restored, and the note duly protested, and an action brought against the indorser, as on a note for the original amount. *Held*, that the indorser was not liable. *Citizens Nat. Bank v. Richmond*, 121 Mass. 110.

1695. Where a joint and several note, made by the three defendants to the order of plaintiff and another party, was by that party indorsed and transferred to the plaintiff. *Held*, that the plaintiff alone could bring suit on the note, and that the district court did not err in overruling a demurrer to plaintiff's petition, on the ground that "there was a defect of parties plaintiff." *Regan v. Jones*, Wyoming S. C. Repts. 210.

1696. An indorser of a check given with his knowledge in payment of a gambling debt, who pays the check to the holder upon non-payment by the drawee and protest, cannot recover therefor, from the drawer, or a prior indorser. A. having paid B.'s gambling debt, A. knowing it to be such debt, gives him no right of action against B. for the amount so paid. *Scollans v. Flynn*, 120 Mass. 271.

1697. The indorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it, which the payee would have had, if no equities had ever existed against the note. *Linville v. Savage*, 58 Mo. 248; *Logan v. Smith*, 62 Mo. 455.

**1698.** The transfer of a note received by mortgage carries the mortgage with it, unless the mortgage has been separately extinguished, as by a release for instance. *Ibid.*

**1699.** The indorser of a note will not be held bound by a fraudulent alteration made subsequently to his indorsement, unless through negligence; the instrument has been so loosely drawn as to easily admit of alteration, and in a matter not calculated to place a man of ordinary prudence on the alert. But where no blank space was left unfilled, and the rate of interest was, after indorsement and without the knowledge of the indorser, inserted by interlineation in ink of a different color from that employed in the remainder of the note, it was held that the instrument upon its face bore such indications as should have excited suspicion and provoked inquiry; and that under such circumstances the indorser was not bound. *Capital Bank v. Armstrong*, 62 Mo. 59.

**1700.** The mere fact that the alteration of a note is not made fraudulently, nor for the purpose of changing its legal effect, will not change the rule as to the liability of a prior indorser. *Ibid.*

**1701.** The defendant in 1867 indorsed the notes of C. for his accommodation to the amount of \$7,000, and continued to indorse for him to the same amount, for purposes of renewal or payment, till 1873. In 1869 the plaintiffs, a bank, discounted some of these notes to the amount of \$5,000 for C., and continued a line of discount of the same amount and upon the same indorsements till 1873. At this time C., having received from the defendant his indorsement upon a note of \$2,000, the note being in all respects complete, fraudulently altered the amount to \$5,000, and procured its discount by the plaintiffs, who took it without suspicion, and with the proceeds C. took up his notes at the plaintiffs' bank for \$5,000, upon \$4,000 of which the defendant was indorser, the bank discounting the note for the purpose of applying the proceeds in that manner. C. had formerly been in the defendants' employment, and had his entire confidence; and the defendant had been in the habit of endorsing paper sent to him for that purpose by C., without making any entry of the transaction, and in several instances had indorsed notes in which the time of payment was left blank. *Held*, That the Court could not, from all these facts, infer an agency on the part of C. under which his act in altering the note would be binding upon the defendant. *Aetna Bank v. Winchester*, 43 Conn. 391.

**1702.** That the negotiation of the altered note to the plaintiffs did not render the defendant liable on his indorsement, as an act in the apparent exercise, and within the apparent scope, of an agency on the part of C. *Ibid.*

**1703.** That the principle that, where one of two innocent persons must suffer by a fraud, he who furnished the means for committing the fraud should bear the loss, had no application to the case, as the defendant, having delivered the note to C. complete, could not be regarded as having furnished him the means of committing the fraud. *Ibid.*

**1704.** That the rule that holds an indorser liable, although the note is used in a different manner from that intended by him, did not apply, as in such cases the contract is still the genuine contract of the indorser. *Ibid.*



1705. That the defendant was not estopped by the facts from denying his liability upon the indorsement. *Ibid.*

1706. The plaintiffs indorsed a note at the request and for the accommodation of D., which had been made by another person for D.'s accommodation, and which was first indorsed by him. At this time there was an understanding among all the parties that D. was to get the note discounted at a certain bank. He, however, was not able to accomplish this, and, without the knowledge of the plaintiffs, deposited it with the defendant as security for a loan of less amount, with an agreement that he might redeem it on paying the amount loaned, with certain agreed interest. In violation of this agreement the defendant sold the note to a *bona fide* holder for full value; and D. and the maker being insolvent, the plaintiffs were compelled to pay it in an action brought by the plaintiffs for damages caused to them by the fraudulent conduct of the defendant in disposing of the note, in which it was found that he disposed of it to prevent D. from making a set-off of a certain claim which he had against him, it was *Held*, (1) That the understanding between the plaintiffs and D., that he would get the note discounted at a certain bank, could not, so long as their indorsement was without condition, affect his right to dispose of the note in any other manner. (2) That the defendant, having become the lawful holder of the note, had the right, so far as the plaintiffs were concerned, to dispose of it upon any terms that he pleased. (3) That although in doing so he violated his agreement with D., and might therefore be liable to him in damages, yet the plaintiffs, having been subjected to no liability beyond that which they assumed in indorsing the note—namely, that of having the full amount of the note to pay, if the maker or D. did not pay it, were not injured by his act. *Dawson v. Goodyear*, 43 Conn. 548.

1707. Where an indorsement of a negotiable bill purports to pass the title thereto from the indorser, and to divest him of all beneficial interest therein, a consideration for the transfer is presumed, and the burden of proving want of consideration rests upon the party alleging it. *Hook v. Pratt*, 78 N. Y. 371.

1708. The restrictive indorsements which are held to negative the presumption of a consideration, are such as indicate that they are not intended to pass title, but merely to enable the indorsee to collect for the benefit of the indorser. An indorsement to one person for the benefit of another affords no such indication. *Hook v. Pratt*, 78 N. Y. 371.

1709. H., defendant's testator, drew a draft on the treasurer of the M. R. C. Co., payable to his own order. He indorsed it, "Pay to the order of Mrs. Mary Hook, 35 King, for the benefit of her son Charlie." In an action upon the draft, *held*, that the indorsement imported a consideration, and its effect was simply to give notice of the interest of the beneficiary named. *Hook v. Pratt*, 78 N. Y. 371.

## EVIDENCE.

**1710.** In an action to recover the amount of a check drawn by C., plaintiff's assignor, to the order of defendant, and alleged to have been delivered to the latter to be used in purchasing a draft for the drawee, the defendant averred in his answer that the check was intended as a payment in part of a claim which C. "morally owed" the defendant, growing out of a fraud perpetrated by C. in inducing defendant to take a fraudulent note; the alleged facts in reference thereto being set forth in the answer which also averred that defendant settled the claim with C. on his promise that he would at some time pay the loss. On the trial, after L., as a witness for plaintiff, had testified that the check was given to purchase a draft, deway of checks, notes or otherwise." *Held*, that the evidence offered was properly rejected; that evidence of the details of the fraud could not legitimately tend to confirm defendant's version. *Canaday v. Krum*, 83 N. Y. 67.

**1711.** On an issue as to whether certain promissory notes, dated on a particular day, were given for money lost at play and therefore void, it is not allowable to prove that the party giving them was intoxicated on the day of the date of the notes in suit, and that when intoxicated he had a propensity to game. *Thompson v. Bowie*, 4 Wall. U. S. 463.

**1712.** An accidental loss or disappearance in a bank of a bill sent to it to collect, from the bank's not taking sufficient care of letters brought to it from the mail, carries with it a presumption of negligence in the bank; and on suit against it, the burden of proof is on the bank to explain the negligence. *Chicopee Bank v. Philadelphia Bank*, 9 Wall. U. S. 641.

**1713.** Statements either oral or written, made by the vendor after a sale, are incompetent evidence against purchaser. *Clements v. Moore*, 6 Wallace, U. S. 299; also, *Thompson v. Bowman*, 6 Wall. U. S. 316.

**1714.** Statements of a grantor of land made after he has conveyed the land to others are inadmissible to invalidate his previous deed of it. *Steinbach v. Stewart, et al.*, 11 Wall. U. S. 567.

**1715.** The opinions of experts may not be received in evidence where the inquiry is as to a subject which does not require any peculiar habits or study in order to qualify a man to understand it. *Ferguson v. Hubbell*, 97 N. Y. 507.

**1716.** In an action upon a promissory note executed by the firm of H. & M. payable to their order and indorsed by them to K., M. defended on the ground that the note was executed without consideration, was diverted from the purpose for which it was intended and was transferred by K. to the plaintiff as security for an individual indebtedness. Upon a second trial the direct examination of H., who was a witness upon the first trial, but who had since died, was read in evidence in behalf of M. Among the questions asked was what K. gave him for the note; the answer was that K. gave nothing, "but I paid for the note to" M. Plaintiff then offered in evidence the cross-examination of H., wherein he testified that M. was indebted to him in the amount of the note on a private account for which the note was given. M. thereupon was offered as a witness in his own behalf to contradict the evidence of H. as to the consideration for the note. This was objected to



and excluded as incompetent under the Code of Civil Procedure (§ 829). *Held* error; that the evidence offered was within the letter and spirit of the exception in the Code which permits such evidence to be given where the testimony of the deceased person, concerning the same transaction, has been given in evidence. *Potts v. Mayer*, 86 N. Y. 302.

**1717.** At the request of F., defendant's president, who was its general manager and financial agent, and in the frequent habit of borrowing money on its account, plaintiff raised moneys on his own credit which he delivered to F. as a loan to the corporation. In an action to recover for the moneys so loaned, *held*, that in the absence of evidence tending to show, or an offer to show, that plaintiff acted in bad faith, or had knowledge or information that F. did not intend to use the money in the business of the corporation, an offer to show that said money was not so used was properly excluded. *Kraft v. F. P. & P. Ass'n*, 87 N. Y. 628.

**1718.** Parol evidence is admissible to explain receipt. It is also admissible to explain a written contract, as a general rule. *Pribble v. Kent*, 10 Ind. 327.

**1719.** Memorandum-book, having alterations and erasures in amounts kept by a party himself, is not admissible in evidence. *Doster v. Brown*, 25 Ga. 153.

**1720.** Want of date in memorandum-book is no objection to its admission in evidence to prove an account. The date of the account may be proved by other evidence. *Ibid*.

**1721.** W., as a witness for defendants, testified that he sold the bond in question, and four others of the same description, to plaintiffs, and upon cross-examination that he was owner of the bonds. Plaintiffs produced, and were permitted to give in evidence, a memorandum, in the handwriting of W., showing that four of the bonds belonged to another person, also a check given for the purchase-money, which was made payable to that person. *Held*, no error. *Nicolay v. Unger*, 80 N. Y. 54.

**1722.** The right of a partner to sign the firm name to a contract of indemnity in favor of third person must be strictly proved; but it need not necessarily be proved in a written authority to him. *Moran, et al. v. Prather*, 23 Wall. U. S. 492.

**1723.** In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him. *Crosby v. Buchanan*, 23 Wall. U. S. 420.

**1724.** Entries in the defendant's own books, whose purport was to show that the transaction was on account of T., are not admissible. *Mulhall v. Keenan*, 18 Wallace, U. S. 342.

**1725.** The affidavit of assessors as to the obtaining the requisite consents to the issuing of town bonds only *prima facie*, not conclusive evidence of facts therein stated. *Town of S. v. Teutonia S. Bank*, 84 N. Y. 403.

**1726.** When entries in book of corporation competent against officers. *First Nat. Bank v. Tisdale*, (Mem.) 84 N. Y. 655.

**1727.** The G. M. Life Insurance Company loaned certain moneys,

for which it received the individual notes of T., defendant's cashier; the checks for the amounts loaned were made payable to the order of T., and the entries of the loans in the books of said company were as made to T. *Held*, that these were not conclusive that the loan was made to T. individually; but that it was proper to show by oral evidence that the loan was made to defendant. *Pierson v. At. Nat. Bank* 77 N. Y. 304.

**1728.** A party to an action, by calling the opposite party as a witness, does not become bound by his testimony, but may dispute specific facts so testified to, although not permitted to impeach the character of the witness for truth. *Cross v. Cross*, 108 N. Y. 628.

**1729.** In an action upon a promissory note, the defence was, in substance, that defendants purchased for plaintiff, and with her money, certain United States bonds; that, she not desiring to be known as the purchaser, they were bought in a defendant's name, and left in their hands for safe keeping, the note being given as a means of insuring the delivery of the bonds when called for, or of obtaining a compensation therefor if they were withheld; and that the bonds were subsequently delivered to plaintiff's husband, who was her authorized agent. Upon the trial one of the defendants was allowed to testify to conversations with plaintiff's husband, who was then deceased, in one of which he requested witness to go and purchase the bonds in his own name. No authority had then been shown in plaintiff's husband to act for her, and the evidence was objected to on that ground; the authority was subsequently proved, and it appeared from the record that the trial court knew that this should be established before the declarations were competent. *Held*, that the objection was simply to the order of proof, which is always in the discretion of the court, and so was untenable. *Platner v. Platner*, 78 N. Y. 90.

**1730.** In an action to recover moneys paid for a forged bond, alleged to have been sold by defendants to plaintiffs, the defence was that the bond was sold by W., the owner, and was simply delivered by defendants, who held it, as security for a loan. A witness for defendants having testified to the transactions within his knowledge, was asked whether defendants' firm ever sold the bond to plaintiffs, this was objected to and excluded. *Held*, no error, as it called upon the witness to place a construction upon the facts, which was for the jury to do. *Nicolay v. Unger*, 80 N. Y. 54.

**1731.** The plaintiff's books of original entries are competent evidence of the items and the amount of the debt claimed, and he may show by other evidence the other facts which entitle him to recover. *Noar v. Gill*, 111 Penn. 488.

**1732.** To acquire the force of law a custom must have been established and become general so that a presumption of knowledge by the parties can be said to arise. *Saint v. Smith*, 41 Tenn. 51.

**1733.** After the receipt in evidence of written certificates signed by defendant and the payee, attached to other similar paper to the effect that they were business paper, plaintiff was allowed to prove, under objection and exception, statements of the payee when transferring the paper to the same effect as the certificates. *Held*, that if erroneous, the error could have done no harm, as it was but a repetition, in a



feebler way, of the declarations furnished by defendant to the payee to be used by him. *Bayliss v. Cockcroft*, 81 N. Y. 364.

**1734.** Plaintiff was allowed to testify, under objection and exception, that he believed in the truth of a certificate required of and given by defendant to the effect that the note in suit was business paper, and that he had no intention to use it to evade the statute of usury. *Held*, no error. *Bayliss v. Cockcroft*, 81 N. Y. 364.

**1735.** The courts of this State will not take judicial notice of any laws of another State not according to the common law. *Harris v. White*, 81 N. Y. 534.

**1736.** The title of the assignee of a non-negotiable promissory note cannot be affected by declarations of the assignor, made after the assignment. *Van Gelder v. Van Gelder*, 81 N. Y. 625.

### EXECUTION.

**1737.** This action was upon a promissory note made by defendant W., and indorsed for his accommodation by defendant E. Judgment was entered against W. by default; execution issued and delivered to the sheriff with directions not to act upon it or make any levy until further orders. During the life of the execution W. had in his open and visible possession personal property sufficient to satisfy it. When plaintiff directed a levy no property could be found. *Held*, that no lien was acquired upon the property of W. by the issuing of the execution; that plaintiffs were under no obligation to E. to secure such a lien; and that therefore the facts constituted no defence as to E. *Smith v. Erwin*, 77 N. Y. 466.

### EXEMPTIONS.

**1738.** The members of a firm are neither severally nor jointly entitled to partnership assets, exempted to heads of families under section 11 of the statute touching exemptions. *State ex rel. Billingsley v. Spencer*, 64 Mo. 355; *Pond v. Kimball*, 101 Mass. 105; *In re Handlin*, 3 Dill. 290; *Bonsall v. Conley*, 44 Penn. St. 447; *Guptil v. McFee*, 9 Kas. 30. The courts of New York, Wisconsin and North Carolina hold otherwise.

## FACTOR.

**1739.** Where a factor, in consideration of consignment made to him, makes advances or incurs liabilities for the owner or consignor, such owner cannot, by subsequent instructions, control the action of his factor. If the advances are made or the liabilities incurred on account of the consignment, and before an assent to the directions of the owner in respect to the time of sale as the price, the factor has thereby acquired a special property, and may sell so much as will reimburse him. The owner has a general right to impose terms upon his factor; but that right is restricted if he has drawn against the consignment before the instructions are given, and he cannot control the factor as to time of sale or price unless he pays the factor for the advances made or liabilities incurred. *Cotton v. Hiller*, 52 Miss. 7.

**1740.** At common law, a factor has no power to pledge, whether he is intrusted with the possession of the goods, or with the bills of lading or other symbol of property. *Allen v. St. Louis Bank*, 120 U. S. 20.

**1741.** A usage of trade for banks to take pledges from factors, as security for the payment of the general balance of account between them, of goods known to be held by them as factors, is unlawful. *Ibid.*

**1742.** An unauthorized pledge by a factor, of goods owned by a partnership of which he is a member to secure the payment of his own debt to one who knows him as a factor only, is invalid against partnership. *Ibid.*

**1743.** Factor must keep books in which shall be correctly entered the transactions on account of his principal, and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith. If the answer is ambiguous in this respect, an objection to it will be sustained. *Keighler v. Savage Mfg Co.*, 12 Md. 383.

**1744.** If a factor, to whom the owner of goods has made a negotiable promissory note and consigned the goods under an agreement between them that the proceeds of the goods when sold shall be applied to the payment of the note, indorses the note and pledges the goods to secure the payment of advances made to him by one who knows him to be a factor and to hold the goods as such, the pledgee is bound to apply the proceeds of the goods to the payment of the note, and the maker may set up this obligation in defence of an action by the pledgee on the note. *Allen v. St. Louis Bank*, 120 U. S. 20.

**1745.** As a general rule a factor cannot bind his principal by a disposition of his property out of the ordinary course of business nor can his disposal of the goods in violation of the order of his principal, even to repay advances, at least, until he has called upon his principal for reimbursement. *Commercial Bank v. Heilbronner*, 108 N. Y. 439.

**1746.** Where a firm of commission merchants, which was insolvent, for the purpose of protecting its principals, opened a bank account in the name of the firm, with the word "agent" added, the bank having knowledge of such purpose, and deposited to the credit of that account the proceeds of sales of goods of a principal, and upon settle-



ment gave to him a check for the balance belonging to him, *held*, that the bank had no right to charge against the account an individual debt of the firm, even with its consent. *Baker v. Nat. Ex. Bank*, 100 N. Y. 31.

### FAIR DEALING.

**1747.** When any transaction is equally susceptible of two explanations, one of which is that it is fraudulent, and the other is consistent with good faith and fair dealing, that explanation will be preferred which is consistent with good faith and fair dealing. Parol evidence is admissible for the purpose of showing that a deed absolute on its face was in fact intended as a mortgage. *Hurford v. Harned*, 6 Oregon, 362.

**1748.** Where a fiduciary relation is shown to exist the burden is upon the person taking securities or contracts enuring to his benefit, to show that the transaction is just and fair. *Fisher v. Bishop*, 108 N. Y. 25.

**1749.** The rule is not limited to cases of attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person treated with an advantage, in treating with the person so confiding. *Ibid.*

### FALSE PRETENCES.

**1750.** An action of deceit will not lie upon false representations either as to what a patent-right cost the vendor; or was sold for by him; or as to offers made for it, or profits that could be derived from it; or for any mere expressions of opinion of any kind about the property sold. *Bishop v. Small*, 63 Me. 12. Where the testimony does not exhibit any want of ordinary care on the part of the plaintiff in an action of deceit, but the reverse, the jury may properly be instructed that it will not relieve the defendant from liability to come into court now, and say to the plaintiff, "If you had exercised more diligence and circumspection it would have frustrated my plan for deceiving you, and therefore you cannot recover." *Roberts v. Plaisted*, 63 Me. 335.

**1751.** False representations made by one party to another to induce him to enter into a contract, will not avoid the contract, unless it is shown that the party complaining relied upon such representations, and was thereby misled and induced to make said contract. *Dunning v. Cresson*, 6 Oregon, 241. Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated

to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor against the partner making such false representations. *Eaton C. & B. Co. v. Avery*, 83 N. Y. 31.

### FINDINGS OF LAW AND FACT.

**1752.** No fact can be considered for purpose of reversing judgment entered on decision of court or report of referee, unless stated in findings or requested to be found on uncontroverted evidence. *Thomson v. Bank of British No. Am.*, 82 N. Y. 1.

### FIXTURES.

**1753.** A mortgage of a building covers an engine and boiler, a steam gauge, a water tank, a steam pump connected therewith, and the shafting therein, intended to permanently increase the value of the building for occupation; but not machines which are incidental merely to the particular business carried on in the building at the time, although some of them are attached to the building by nails or bolts. *McConnell v. Blood*, 123 Mass. 47.

**1754.** Actual annexation to the realty or something appurtenant thereto, is the condition upon which property, ordinarily regarded as personal, become a fixture and part of the realty. The intention to make a chattel a part of the realty, is only important upon the question whether the owner intended to make the chattel so fixed a temporary or a permanent accession to the freehold. Having once been a part of the realty, a removal temporarily, without intent to sever permanently, will not reconvert the chattel into personalty and destroy its character as a fixture. *Williamson v. New Jersey R. R. Co.*, 29 N. J. 311.

**1755.** Fixtures erected by a tenant on the demised premises for the purpose of carrying on his trade, being necessary to the enjoyment of the term are personal property during the continuance of the term. *Kile, Sheriff v. Gielner*, 114 Penn. 381.

### FOREIGN CORPORATIONS.

**1756.** Section 8 of the act of the Legislative Assembly of Oregon, entitled "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in the State," approved October 21, 1864, is an indirect prohibition against such corporations transacting business in the State until they shall have executed and recorded the power of attorney required by that section. A contract made by such corporation in this State before it



shall have complied with the provisions of said section 8 is as to third parties void, and cannot be enforced by the corporation. *Bank of British Columbia v. Page*, 6 Oregon, 431.

## FORECLOSURE.

**1757.** A bill to foreclose a mortgage or deed of trust may be brought in the name of the real owner of the note secured. *Hahn v. Huber, et al.*, 83 Ill. 243.

**1758.** Where the terms of a mortgage or deed of trust require before any foreclosure or sale under it is made, sixty days' notice shall be given in certain newspapers; a sale without the notice conveys no title. *Bigler v. Waller*, 14 Wall. U. S. 297.

**1759.** A purchaser upon, and in possession under, a foreclosure sale, void as against the owner of the equity of redemption, because he was not made a party to the foreclosure suit, does not stand in the position of mortgagee or assignee of the mortgage in possession, but as a stranger. *Shriver v. Shriver*, 86 N. Y. 575.

**1760.** In an action to foreclose a mortgage given to N., plaintiff's testator, to secure the payment of four promissory notes, dated November 2, 1874, for a loan of \$6,000, "payable in three months from date, with interest," the defence was usury. It was proved on the part of the defendants, without contradiction, that in February, 1875, when the notes fell due, N. demanded of the defendant's agent three months' interest at the rate of ten per cent. per annum, and stated that it was "due upon the notes." This was paid in compliance with the demand, and N. gave a receipt therefor, acknowledging the receipt of \$150 for the three months' interest "due on the notes." Four successive quarterly payments were demanded and received thereafter at the same rate and receipted for as due upon the notes. In August, 1876, N. wrote to one of the defendants, stating that two quarterly payments of interest were due, and requested payment of \$300 therefor. *Held*, that the demands and acquiescence therein amounted to an acknowledgment by both parties that the original securities were given under an agreement that they should bear interest at the rate of ten per cent.; and that a refusal to find that the loan was usurious was error. *Smith v. Hathorn*, 88 N. Y. 211.

**1761.** In an action to foreclose a mortgage, commenced prior to the enactment of the code of Civil Procedure, a deficiency judgment was demanded against defendant B., to whom M., the mortgagor, had conveyed, subsequent to the mortgage, by deed, containing a clause stating that B. assumed and agreed to pay the mortgage. M. and B. both appeared and answered; the latter alleged in her answer that she did not assume or agree to pay the mortgage; that M., to whom she entrusted the transfer, without her knowledge or consent, fraudulently caused said clause to be inserted; that she accepted the deed, believing it had been drawn according to the prior agreement, and that she did not know that it contained the clause. She demanded that the deed be reformed by striking out the clause and the complaint dismissed as to her. Upon the trial, B. offered to prove the facts alleged in her

answer; this proof was objected to and excluded. *Held* error; that as the action was in equity, and M. a party, a complete determination of every question arising under said answer, in which plaintiff was interested, could have been had; that if it desired to have M. bound by the determination of the issues presented by said answer, it could have given him notice of B.'s defence, and offered him the future management of the suit. (Code of Procedure, §§ 122, 274; Code of Civil Procedure, §§ 452, 1204.) *Albany City Svgs. Inst. v. Burdick*, 87 N. Y. 40.

**1762.** The provision of the mechanics' Lien Law (Laws of 1863, chap. 500, § 11), declaring that liens shall "in all cases" cease at the expiration of one year, unless continued by order of the court, refers to the lien on the premises; it has no reference to a claim by the lienor for surplus moneys arising on sale of the land upon judgment in foreclosure, which cuts off the lien; as, in such case, the claim of the lienor is reduced to a right to the avails. *Em-Ind. Svgs. Bank v. Goldman*, 75 N. Y. 127.

**1763.** H. R. conveyed certain premises to R., who conveyed them to the wife of the former; to secure a loan made to H. R. of \$4,500 he and his wife executed their bond with a mortgage upon the premises; subsequently she conveyed an undivided half of the premises to S., who conveyed it to H. R. The latter procured a loan of \$8,000, for which he gave his individual bond, secured by mortgage upon the whole premises, executed by him and his wife. Of this sum sufficient was taken to discharge the prior mortgage; the interest upon which had been paid by H. R. until its discharge; and he also paid the interest upon the new mortgage up to the time of his death. His wife never recognized the loan for which it was given as made for her benefit, but always claimed it was to her husband, to be paid as between them out of his half of the premises. H. R. died leaving a will, by which his wife and W. were appointed executors, with power to sell real estate. Mrs. H. R. subsequently borrowed of M. \$4,000, giving her bond, secured by mortgage upon her undivided half of the premises. Certain judgments, also, were recovered against her, and executions were issued thereon, under which her half was sold to C. and S., who received the sheriff's deed; they also bid off the same on foreclosure of the mortgage so given by her. The executors of the will of H. R. conveyed his undivided half to T. In a contest as to surplus moneys arising on sale under judgment of foreclosure of the \$8,000 mortgage, *held*, that as the facts showed that the mortgage foreclosed was given to secure a debt of H. R., his wife, as to her undivided half of the premises, standing simply as a surety for him, as between them, his half was in equity primarily liable to pay the debt; and she would have been entitled to any surplus to the extent of the value of her undivided half; that under the mortgage executed by her, the mortgagee took the position and acquired the rights Mrs. H. R. had at the time she executed it, to which C. and S. by their purchase succeeded, and so were entitled to the surplus. *Erie Co. Savings Bank v. Roop*, 80 N. Y. 591. Also, *held*, that the rights so acquired by the mortgagee and by C. and S., were not affected by any acts or agreements on the part of Mrs. H. R. to which they did not assent. *Erie Co. Savings Bank v. Roop*, 80 N. Y. 591.



## FORGERY.

**1764.** Where several persons are parties to a forgery, by means of which another is induced to pay moneys to one of them, who acts, in obtaining the money, in behalf of those engaged with him in the forgery, an action for money had and received is maintainable against all; it is not necessary to establish that each of the defendants received a share of the proceeds. *Un. Tr. Co. v. Gleason*, 77 N. Y. 400.

**1765.** A wife who merely aids her husband in the commission of the forgery, or an individual creditor; nothing more than the debtor's interest in the property can in any event be liable. *Atkins v. Saxton*, 77 N. Y. 195.

**1766.** Equity will reform a contract where there is a mistake on one side and fraud on the other. *Ibid.*

**1767.** In an action to recover, as for moneys had and received, moneys obtained from plaintiff by one R. upon pledge of forged bonds, held, that evidence connecting one of the defendants with the forgery was not sufficient to make her liable in the absence of evidence of any agreement or understanding between her and the forger, that she was to share in the proceeds of the forged paper, or was personally to have a benefit therefrom, or that R. was employed or acted as her agent, or that she actually received any part of the sum obtained. *N. Y. Guar. and Ind. Co. v. Gleason*, 78 N. Y. 503.

**1768.** A forged certification on a check, when confirmed, verbally or otherwise, by an officer duly authorized to certify checks, is good against the bank whose officer confirmed such a forged certification and an action will lie to enforce its payment of the check. *Continental Nat. Bank v. National Bank*, 50 N. Y. 575.

## FORMER ADJUDICATION.

**1769.** It seems that it is only a final judgment upon the merits which is competent as evidence and conclusive in a subsequent action between the same parties or their privies. *Webb v. Buckelew*, 82 N. Y. 555.

**1770.** Certain notes had been given by defendant to R., plaintiff's assignor, which were usurious; a judgment for the full amount of the notes was entered, and the bond in suit was given, in pursuance of an agreement, made to evade the statute against usury, between R. and defendant, that the latter should allow such judgment to be entered, and should then give the bond in satisfaction thereof. Held, that the judgment was not a bar to the defence of usury. *Moses v. McDivitt*, 88 N. Y. 62.

## FRAUDS.

**1771.** The rule is universal, whatever fraud creates justice will destroy. Where fraud is committed in the name of a corporation, by persons having the right to speak for it, for their personal benefit, they

will be made to answer personally for the injury inflicted by their fraud. *Jewell v. Bowman*, 29 N. J. 171.

**1772.** Fraud is never presumed, and to justify a court of equity in setting aside or in any manner interfering with a judgment on this ground the fraud must be clearly and conclusively established. The burden of proof is on the complainant to prove his case as it is alleged by the bill, and circumstances of mere suspicion will not warrant the conclusion of fraud. *Hill v. Reefsnyder, et al.*, 46 Md. 555.

**1773.** D. & Co. sued B. upon the following agreement, signed by B. and others, but not under seal: "We, the undersigned, take pleasure in recommending S. to D. & Co. We also severally agree to become responsible for \$350 to said D. & Co., to be forthcoming in thirty days after the final delivery of the work." *Held*,

**1774.** 1. That the consideration for this guaranty could not be collected, or implied with *certainly* from the *instrument itself* without recourse to parol proof, or to other papers unconnected with it save by such proof. 2. That parol testimony for the purpose of showing that the guaranty did refer to a contract between S. & D. & Co., and thus make out a consideration for it, was wholly inadmissible if objected to. *Deutsche, et al., use of Kanders v. Bond*, 46 Md. 164.

**1775.** A contract for the purchase of goods on credit, made with intent, on the part of the purchaser, not to pay for them, is fraudulent, and if the purchaser has no reasonable expectations of being able to pay, it is equivalent to an intention not to pay. But where the purchaser intends to pay, and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent, and does not disclose it to the vendor, who is ignorant of the fact. *Talcott v. Henderson*, 31 Ohio, 163.

**1776.** To defeat a sale it is not necessary to establish a fraudulent intent on the part of the purchaser, but it will be sufficient if it be shown that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon an inquiry which would have led to a knowledge of the fraudulent purpose of the seller. A purchaser in good faith, who has paid a part of the purchase money, is entitled to the possession of the goods, notwithstanding he may subsequently discover that the vendor sold them with intent to defraud his creditors. *Jones v. Hetherington, et al.*, 45 Iowa, 681.

**1777.** An action for fraudulent representations, as a general rule, cannot be maintained without proof that defendant believed, or had reason to believe, the representations to be untrue when made, and that they were made with fraudulent intent. *Stitt v. Little*, 18 Sickels, N. Y. 427.

**1778.** A balance due one of the assignors from an insolvent bank was omitted; this was shown to be worthless. *Held*, that no inference of fraud could be drawn from the omission. *Schultz v. Hoagland*, 85 N. Y. 464.

**1779.** At the time of the execution of the assignment there was a balance standing to the credit of one of the assignors upon the books of another bank; this was not included in the inventory. It appeared that the assignment was executed and filed on Saturday; this balance was withdrawn the next Monday; it did not appear by whom or in



what manner. The inventory was subsequently made and was verified. *Held*, that the presumption was that the balance was drawn out on the check of the assignor, executed prior to the assignment; also, that a failure of the assignor to explain the transaction did not authorize the presumption that he was the owner of the balance at the time of the assignment; that until proof was given sufficient to authorize a presumption of fraud, the assignors were not bound to explain. *Schultz v. Hoagland*, 85 N. Y. 464.

**1780.** To constitute a disposition of property by a debtor with intent to defraud his creditors, the thing disposed of must be of value, out of which a creditor could have made a portion of his claim, it must have been transferred by the debtor and this with intent to defraud. *Hoyt v. Godfrey*, 88 N. Y. 669.

**1781.** A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portions; nor is the effort a defence to an action to recover possession, against one in whose hands a part is found. *Powers v. Benedict*, 88 N. Y. 605.

**1782.** On the trial an indictment charging forgery of the notes of a bank of another state or country, it is not necessary to prove by direct evidence the due incorporation of the bank. *People v. D'Argeneour*, 95 N. Y. 624.

**1783.** No legal duty rests upon a party to an action in whose favor a judgment has been rendered therein, to disclose a mistake made in his favor to his opponent; and an agreement between him and an assignee of the judgment to keep silent as to the mistake, is not actionable fraud. *Wood v. Amory*, 105 N. Y. 278.

**1784.** If, at the time of the discovery of a fraud, the party injured has a legal capacity to act and to contract, his right of action accrues and the statute of limitations begins to run against it, irrespective of the degree of intelligence possessed by him, or his freedom from undue influence, or his ability to resist it. *Piper v. Hoard*, 107 N. Y. 67.

**1785.** The mere fact that an assignment of property by a debtor was voluntary and without consideration is not sufficient to require a finding that it was fraudulent against creditors. *Genesee River Nat. Bank v. Mead*, 92 N. Y. 637.

**1786.** Illegal acts prejudicial to rights of others are frauds on those rights, although the parties are innocent of any intention to commit a fraud. If the act is in effect a fraud upon the creditor, the motive of the parties are of no consequence. *Logan v. Logan*, 22 Florida, 561.

**1787.** Whosoever receives property knowing it to be the subject of a trust and to have been transferred by the trustee in violation of his duty or power, takes it subject to the right, not only of the *cestui que trust*, but of the trustee to reclaim possession. *Zimmerman v. Kinkle*, 108 N. Y. 282.

**1788.** An assignee for the benefit of creditors may attach a chattel mortgage executed by his assignor as fraudulent and void to creditors. *Ball v. Slaften*, 98 N. Y. 622.

**1789.** A mere fraudulent representation is not actionable *per se*. To recover, the plaintiff must not only show that the representations

were made, and that they were false and fraudulent, but he must also show, affirmatively, that he has been injured thereby, that he is, in some way, placed in a worse condition than he would have been had the words been true. *Bartlett, et al. v. Blaine*, 83 Ill. 25.

**1790.** Infancy is a bar to an action on a case of false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged. *Doran v. Smith*, 49 Rowell, Vt. 353.

**1791.** Material representations by a vendor of matters assumed by him to be within his personal knowledge, made with intent to deceive the vendee, which are untrue and are relied upon by the vendee in making the purchase to his damage, are, in a legal sense, false and fraudulent, although the vendor did not know them to be untrue.

**1792.** When a vendor, in the course of the negotiations for a sale, authorizes an agent to make representations to the vendee as to the quality of the goods to be sold, and recommends the agent to the vendee as one whose statements are to be relied upon, such vendor is liable for false representations made by the agent.

**1793.** Although, upon a sale of property a warranty of quality is taken by the vendee, yet, if it appear that he was induced to make the purchase and to take the warranty in reliance upon representations on the part of the vendor knowingly false and fraudulent, an action *ex delicto* may be maintained. *Indianapolis, Peru & Chicago R. R. Co., Resps. v. Tyng, Appell.*, 18 Sickels, N. Y. 653.

**1794.** A party can only commit a legal fraud in a business transaction with another by fraudulent misrepresentations of fact, or by such conduct or artifice for a fraudulent purpose as will mislead the other party or throw him off his guard and cause him to omit inquiry or examination which he would otherwise make. *Dambmann v. Schulting*, 75 N. Y. 55.

**1795.** A division of copartnership property between the partners in proportion to their interests, for the purpose of protecting the property from seizure by the individual creditors of one of the partners, is not unlawful, and cannot be avoided as a fraud upon the individual creditors. By such a transaction the other partners do not acquire any of the property of the debtor, but only separate their own from his, so that their portion shall not be interfered with for his debts. *Atkins v. Saxton*, 77 N. Y. 195. But even if a fraud is perpetrated, the whole property does not become liable to seizure upon attachment at the suit of a mechanic who is simply employed to execute some portion of the work and is paid for his services, having no concern with or interest in the fruits of the crime, is not liable in an action *ex contractu* for money advanced upon the forged instrument. *Un. Tr. Co. v. Gleason*, 77 N. Y. 400.

**1796.** It is no defence to a suit for debt that the debt arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purpose, and that the bills were void in law, and finally proved worthless in fact; the bills themselves having been actually current at the time the defendant received them, and they not having proved worthless in his hands, nor he being bound to take them back from persons to whom he had paid them away. *Orchard v. Hughes*, 1 Wall. U. S. 73.

**1797.** A sale of personal property, made much below its costs, by



a man indebted to near or quite the extent of all he had, set aside as a fraud on creditors; it having been made within a month after the property was bought, and before it was yet paid for; made, moreover, on Saturday, while the account of stock was taken on Sunday (the parties being Jews), and the property carried off early on Monday. *Kempner v. Churchill*, 9 Wall. U. S. 362.

**1798.** Where it appeared that the drawee of a bill of exchange promised to pay the amount by the time or upon a contingency named, and that the payee, relying upon this, permitted the bill to remain in the hands of the former, and no demand or request for its return, and a denial or evasion thereof was proved, *held*, that the promise to pay was void under the statute of frauds (2 R. S., 135, § 2), as it was an oral promise to answer for the debt of another. *Matteson v. Moulton*, 79 N. Y. 628.

**1799.** Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible. *Lincoln v. Clafin*, 7 Wall. U. S. 132.

**1800.** Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence. *Ibid.*

**1801.** Equity will not allow the statutes of frauds to be set up where the contract has been largely performed on both sides. *Swain v. Seamens*, 9 Wall. U. S. 254.

**1802.** An indictment for obtaining money by false pretence, charging that the money was obtained by both a pretence and a promise, is within the statute, if the pretence of a false existing, or a past fact be sufficient. *Commonwealth v. Wallace*, 114 Penn. 405; *Commonwealth v. Adley*, 1 Pearson (Penn.) 62; *Commonwealth v. McCrosius*, 2 Clart. (Penn.) 6.

**1803.** The grantor in an alleged fraudulent conveyance, with a full knowledge of the facts, is estopped from testifying against his own warranty of title, that the same is fraudulent. *Fredericks v. Davis*, 3 Mont. 251.

**1804.** To render a conveyance fraudulent as against creditors, there must be mutual participation in the fraudulent intent on the part of both grantor and grantee. *Curtis v. Valiton*, 3 Mont. 153.

**1805.** Whosoever sets up fraud as a cause of action must do more than allege fraud on general and abstract terms; he must set out the specific facts in which the fraud consists. *Kerr v. Steman*, 72 Iowa, 241.

**1806.** Damage as well as fraud must be shown to entitle a complainant in equity to relief on the ground of fraud. *Bigly v. Powell*, 25 Ga. 168.

**1807.** General plea of fraud is demurrable under Indiana Code. The facts constituting the defence must be set out. *Keller v. Johnson*, 11 Ind. 337.

## GIFT.

**1808.** To establish a valid gift, a delivery of the subject of the gift to the donee, or to some person for him, so as to divest the possession and title of the donor, must be shown. *Young v. Young*, 80 N. Y. 422.

**1809.** To make a valid gift in *præsenti* of an instrument securing the payment of money, reserving to the donor the accruing interest during life, without a written transfer or declaration of trust, there must be an absolute delivery of the security to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest. *Young v. Young*, 80 N. Y. 422.

**1810.** If the donor retains the instrument under his own control, though merely for the purpose of collecting the interest, there is an absence of the complete delivery essential to the validity of a gift. *Young v. Young*, 80 N. Y. 422.

**1811.** So, also, such a gift cannot be made by creating a joint possession of donor and donee, even if it be with the intention that each shall have an interest. *Young v. Young*, 80 N. Y. 422.

**1812.** It is essential to constitute a valid gift, that there should be a delivery such as rests in the donee control or dominion over the property, and absolutely divests the donor, and the delivery must be made with intent to vest the title in the donee. *Jackson v. Twenty-third St. R. Co.*, 88 N. Y. 520.

## GUARANTY.

**1813.** In response to an order for goods, plaintiffs replied that they would not deliver them unless the purchaser would procure some one to guarantee payment for them; the purchaser answered, stating that defendant had offered to assist him, and defendant indorsed upon the letter his agreement to the proposition. *Held*, that he was liable as guarantor. *Westphal, Hinds & Co. v. Moulton*, 45 Iowa, 163.

**1814.** Where the guarantor undertook to insure the payment of all indebtedness of his principal to the guarantee, whether consisting of accounts, notes, indorsement of notes or otherwise, the guarantor was held to be liable upon notes which his principal transferred to the guarantee, with no other indorsement than simple words of guaranty. If, under the contract of guaranty, the guarantee took other or different notes than those provided for in the contract, or gave additional time for payment to the principal, or waived any material condition on which payment was to be made, the guarantor was released from liability. *The Davis Sewing Machine Co. v. McGinnis, et al.*, 45 Iowa, 538.

**1815.** In an action on a guarantee, alleged to be contained in a letter and telegram in which there were no words of doubtful trade meaning, and the extrinsic facts not being in controversy,—*Held*, that the question whether the words used amounted to a contract of guarantee was for the determination of the court alone. The following



words were *held* not to constitute a contract to guarantee: "Our friends H. and M. have purchased a cargo from G. Last year there was delay and trouble owing to bills of lading coming in different lots, and through more than one source, and without insurance being perfected. If you will obviate a repetition of this now you will oblige us. On presentation of cash order, and all documents at Union Bank, payment will be promptly made. Excuse this trouble." *The Bank of Montreal v. Munster Bank*, Irish Reports, Common Law Series, vol. 11, 47.

**1816.** If a promissory note in the hands of the payee has upon its back the signature in blank of a third person, the presumption, in the absence of proof, is that such person indorsed as a guarantor, but this presumption may be rebutted by clear and satisfactory proof of a different intention.

**1817.** Proof that the indorser's name was put upon the note for the purpose of becoming liable as security that the maker should be responsible for the payment of the note, and that the indorser refused to sign as maker, will not rebut the presumption of a contract of guaranty. 83 Ill. 120.

**1818.** No legal proceedings against the maker of a note are needed to fix the liability of a guarantor, nor is it necessary to show the insolvency of the maker, or to prove demand or notice of non-payment, or to use diligence against the maker. *Stowell v. Raymond*, 83 Ill. 120.

**1819.** In construing contract of guaranty, general rule arising from implication of language used is, that when the amount of the liability is limited, and the time is not, the contract should be construed as a continuing guaranty. *Matthews v. Phelps*, 61 Mich. 327.

**1820.** W., who was engaged in business as a pork packer, and had been a borrower from plaintiff, delivered to it an instrument signed by defendant; which, after reciting that W. desired to increase his facilities for obtaining money and proposed to pledge to plaintiff property that might from time to time be in his possession, to secure discounts and loans, guaranteed to plaintiff "all such pledges of property, warehouse receipts and other vouchers" as may from time to time be given by W., and defendant also promised as follows: "That the property so transferred and set over to said bank, shall not be misapplied or diverted to any other purpose while such loans or advances remain unpaid to said bank, and if any default or misappropriation of the property so pledged shall be made, I do promise and agree to make good any deficiency, and fully satisfy the stipulations contained in said receipts or other vouchers therefor, without requiring any notice to me of the several loans and discounts." *Held*, that the guaranty was simply against a diversion or misappropriation of property which should be pledged to plaintiff by W., and did not cover the risk of a false or fictitious pledge; the defendant undertook that if any pledge was good when taken it should be kept good thereafter, not that W. should actually have in his possession the property which he should profess to pledge. *F. and M. Nat. Bank v. Lang*, 87 N. Y. 209.

**1821.** Defendant set up as a counterclaim in this action and proved that plaintiff transferred, by written assignment to L., defendant's testator, an account against the estate of T.; the assignment

contained an agreement on the part of the assignee, that in case the money received by him from L. could not be collected from "the representatives of" T., he would pay the same to L. with interest. The claim was duly presented by L. to the executors of T., and to a referee appointed in the course of legal proceedings to pass upon claims against his estate. After certain deductions for goods not delivered by plaintiff, the balance of said account was allowed, and upon this a dividend of twenty-five per cent. was paid. The real estate of T. was sold in proceedings before the surrogate, but nothing more was received by L. or other creditors. *Held*, that L. used due diligence in exhausting legal remedies; and that defendant was entitled to counterclaim the balance paid by L. to plaintiff over the percentage so received, that it was not necessary to proceed to judgment and execution against the estate of T. *Schmitz v. Langhaar*, 88 N. Y. 503.

**1822.** Where assignor of order for money agreed, if not paid by party to whom addressed in a certain time, to pay its face value, notice to assignor of non-payment not necessary to recovery by assignee. *Gammell v. Parramore*, 58 Ga. 54.

**1823.** The sufficiency of a complaint founded upon a "special promise to answer for the debt or doings of another," considered and determined. Parol evidence is admissible to show the circumstances under which such a promise was given. The objection that the consideration for such a promise is not stated, does not apply to a guaranty of a note where the written promise of the debtor sets forth a consideration and is made and delivered at the same time therewith. *Wilson S. M. Co. v. Schnell*, 20 Minn. 40.

**1824.** The concealment which will avoid a guaranty must be a fraudulent one; if not fraudulent in fact or in law, the defence is not made out. *Howe Machine Co. v. Farrington*, 82 N. Y. 121.

**1825.** An action will not lie against a guardian's security until there has been a settlement of the guardian's account with the court, and a failure to pay as ordered. *O'Brien v. Strong*, 42 Iowa, 643; also, *Gillespie v. Lee*, 72 Iowa, 346.

**1826.** A consideration is necessary to render a special guaranty valid; and, although it is not essential that it should be expressed in the written contract itself (chap. 464, Laws of 1863), if it is not so acknowledged it must be proved in order to recover on the contract. *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273.

**1827.** To constitute a valid guaranty, there must be a sufficient consideration, a delivery by the guarantor, an acceptance by the person to whom it is given, a subsequent delivery of goods or other property under and in accordance with its terms, and if it is collateral, request of payment and notice of non-payment. Notice is not necessary when the undertaking is absolute. *Marsh v. Putney*, 56 N. H. 34.

**1828.** Where the person, for whose benefit the guaranty is given, becomes insolvent, so that no advantage can arise to the guarantor, notice is unnecessary. *Ibid.*

**1829.** All promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. In the absence of words or circumstances showing a contrary intent, the words "we will see the articles paid for," or equivalent words, import a collateral under-



taking, and are within the statute of frauds. *Wager, et al. v. Halleck, et al.*, 3 Colo. 176.

**1830.** Where the language of a guaranty addressed to a factor is, "I am willing to go his security for the amount of twenty-five hundred dollars," it is not what is termed a *continuing* guaranty. It only embraces the first \$2,500 of money advanced, or goods furnished to the person in whose favor the guaranty is given. The factor thus guaranteed is legally bound to apply to the guaranteed debt, and for the discharge of the guarantor, the first payments received by him from the person in whose favor the guaranty was given. *Ben. Gerson v. G. W. & G. M. Hamilton*, 30 La. 737.

**1831.** A., a bank, had discontinued the note of B. for \$10,000. C. had deposited with A. for collection a note for \$15,000, secured by deed of trust. C. subsequently wrote the president of A. that, having heard that B. "could use advantageously some additional cash over and above the amount already had of your bank," etc., "if your bank will lend to B. \$15,000, I shall hold myself responsible for that amount, and will leave with you as collateral security the note and mortgage" \* \* \* "at present in your vault." The proposal contained in his letter was accepted, of which C. had due notice, and B. drew his check on A. for \$10,000, and took up his note for \$10,000. *Held*, that \$15,000 was the amount which C. guaranteed to pay, and not \$15,000 in addition to what B. had before received of A.; that the fact that the money was had of A., to whom B. owed a note of \$10,000, and that he paid this note out of the \$15,000 so advanced, made no difference in his case; and that the terms of the guarantee were complied in his case; and that the terms of the guarantee were complied with by A. A contract of guarantee must be strictly construed, yet must be so construed as to carry into effect the evident intention of the parties, as it is to be gathered from the instrument itself. *Allen, Adm'r v. Central Savings Bank*, 4 Mo. St. Appeals (St. Louis) 66.

**1832.** The guarantor of a note is not discharged from liability by reason of the failure to serve him with notice of non-payment, unless he can show that he suffered detriment thereby. *Rodabaugh v. Pitkin*, 46 Iowa, 544.

**1833.** The words "we hereby agree to guaranty the payment to M. H. & Co. for any goods which may be purchased of them by A. W. of Lynn, not, however, binding ourselves to become responsible for a larger sum than five hundred dollars, except by another special agreement. The above guaranty to remain in force until its withdrawal by us." *Held*, that the contract sued on clearly appears upon its face to have been intended to be a continuing guaranty. The question of fact of extinguishment or discharge has been decided by the court below in favor of plaintiffs. *Melendy, et al. v. Capen*, 120 Mass. 222. Cases referred to: 1 Metc. 24; 12 Gray, 447—119 Mass. 435.

**1834.** The words of a guaranty will be read most strongly against the guarantor. *Hoey v. Jarman*, 39 N. J. Law, 523.

**1835.** The following instrument, signed by the defendant, was delivered to the plaintiff: "I guarantee the sum five hundred dollars value in glass shades purchased by my son A. from B. Terms of purchase to be sixty days from date of invoice, and if not paid within

ninety days, draft to be drawn on me for the amount." *Held*, that it was not a continuing guaranty. *Held* also, that parol evidence of the previous dealings, or of the dealings contemplated, between the creditor and the principal debtor, or that the grantor had previously agreed to give the plaintiff a guaranty for future advances, and that the goods were sold, relying on such guaranty; or that the relations of the principal parties were well known to the guarantor, was not admissible to show that the instrument was other than a guaranty of a single transaction. *Boston and Sandwich Glass Co. v. Moore*, 119 Mass. 435.

**1836.** An oral guaranty of the payment of the note of a third person, the court held the defendant was doubtless once liable for the goods sold and delivered to him, and upon the due bill which, upon paying part of the price of the goods, he gave to the plaintiffs for the balance; but upon his procuring and delivering to them the note of Robinson, as the bill of exceptions states, "they at the same time gave up the said due bill to him in settlement," and he orally promised to pay Robinson's note at maturity, if Robinson did not. The claim of the plaintiffs, and the finding of the court did not proceed upon the defendant's liability for goods sold, but solely upon this oral promise of his, thereby necessarily assuming that his previous liability had been settled and discharged by the giving and receiving of the note of Robinson. Upon this state of facts, the only direct liability was that of Robinson upon his note, and the oral promise of the defendant to pay the note, if R. did not, was a collateral promise to pay R's debt, and as such within the statute of frauds. *Dows v. Swett*, 120 Mass. 322. Cases recited: 3 Metc. 396; 106 Mass. 400; 108 Mass. 246; 111 Mass. 501.

**1837.** Defendant gave to C. & D. a separate written agreement to assume at maturity a share of the outstanding notes of R. given for his purchase money. The defendant was jointly interested with Currier & Dean in the purchase of a quarry. Advancements had been made, and expenses incurred by the latter in the purchase and improvement of the same, and part had been sold to one Richmond, and his notes taken in payment. The defendant, in a settlement with Currier & Dean, was charged with his share of the expenses and of the original cost, and credited with the part sold. The balance was paid to him by C. and D., who also gave him the written agreement to pay and save him harmless from an outstanding joint note for the purchase money. The defendant, on his part, at the same time gave C. and D. the written agreement aforesaid with regard to the notes of Richmond, given for his purchase of a part of the quarry. This action is brought on the last named agreement, by the assignees in bankruptcy of Currier and Dean, to recover a balance unpaid on one of the Richmond notes, which became due in 1868. The defendant offered to prove that he had no notice of the non-payment of this note until about the time of the commencement of this action, and that for more than two years after the note fell due Richmond was in good credit, and could have paid it, but C. and D. voluntarily gave him time upon it. The court ruled that the evidence would not amount to a defence; and the only question is whether the promise declared on is an original promise of the defendant to pay his own debt, or only a guaranty of the debt of another. In the opinion of the court it is the latter.



The fact that the defendant derives benefit from the transaction is not alone enough to make it an original promise, for there must always be some consideration to support a mere collateral undertaking. It is sufficient if the leading object of the contract, as ascertained from the terms of it, is one of suretyship. By these tests it is clear that the defendant's promise in this case was intended to be collateral to the original principal obligation of another. The agreement was a guaranty, and not an original promise. *Davis v. Caverly*, 120 Mass. 414; also, 98 Mass. 296; 106 Mass. 400; and 118 Mass. 137, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor. These rules are well settled, and are not controverted, and the only question is to which class of guaranties the one now before us belongs. It is apparent upon the face of the instrument that the undertaking of the defendant was not an unconditional one that the mortgagor should pay, or that the guarantor would pay on default of the mortgagor, but only that the guarantor would pay in case of a deficiency arising on a foreclosure and sale. The foreclosure and sale were consequently conditions precedent, and the general principle is that whenever a condition precedent is to be performed for the purpose of establishing the liability of a surety or guarantor, such condition must be performed in good faith, and with due diligence. The delay in foreclosing in the present case was fourteen months after the mortgage debt became due. During upward of ten months of this time the property was a sufficient security, but afterward the buildings thereon were destroyed by fire, and the value reduced below the amount of the mortgage debt. It cannot be questioned that this delay was sufficient to constitute laches. See *Craig v. Parks* (40 N. Y. 181), a delay of six months in foreclosing a bond and mortgage was held to be laches, which discharged a guaranty of its collection. *McMurray, et al. v. Noyes*, 72 N. Y. App. 523.

**1838.** Upon assigning a bond and mortgage, the defendant made the following guaranty: "I hereby covenant \* \* \* that, in case of foreclosure and sale of the mortgaged premises in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, with the costs of foreclosure, I will pay the amount of such deficiency to the said party of the second part, or its assigns, on demand." Held, the fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defence to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor.

**1839.** Due diligence in exhausting the legal remedies against the principal debtor is a condition precedent to any liability against a guarantor of collection. *No. F. Ins. Co. v. Wright*, 76 N. Y. 445.

**1840.** Plaintiff's complaint alleged, in substance, the following

facts: Plaintiff and defendants' firm, W. P. C. & Co., were competitors as carriers by water between N. Y. and P., each owning vessels employed in the business. To consolidate the business, they entered into an agreement to form a corporation, the capital to be represented by vessels furnished by the parties respectively, at a valuation fixed, each to contribute one-half the capital and to receive one-half the stock; W. P. C. & Co., to have the management of the corporation and business, to manage the same in good faith and with economy, and to receive the usual commissions, which were specified, on the freight carried. In consideration whereof said firm guaranteed to plaintiff an annual dividend of seven per cent. for seven years. In pursuance of said agreement "the corporation was duly organized under the laws of this State," the vessels transferred to it, stock issued, and the contract fully performed on the part of plaintiff. Said firm had had the exclusive management of the corporation and business, but no dividends had been declared or paid. Plaintiff claimed to recover on the guaranty. Defendants demurred, claiming the agreement to be illegal, because the parties thereto were but five in number, while the statute contemplates that at least seven persons shall unite in forming a corporation. *Held*, untenable; as the complaint alleges the due organization of the corporation, which imports the requisite number of incorporators; that it was not necessary to aver the precise steps taken to accomplish the result. *Lorrillard v. Clyde*, 86 N. Y. 384.

**1841.** P. and K., a firm of which defendant was a partner, executed to a State bank a written undertaking to be "responsible for the payment of any sum not to exceed" \$5,000, which W. might require of said bank "for legitimate business purposes." In an action upon the guaranty, *held*, that it expressed a sufficient consideration to validate it under the statute of frauds; and that it was a continuing guaranty. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1842.** Also *held*, the fact that the money procured by W., upon the strength of the guaranty, was not used by him in his business, was no defence, in the absence of evidence that such other use was with the knowledge of the bank, or that the bank advanced more money than was needed for his legitimate business purposes, or that it was loaned for other than those purposes; that the bank was not required to see to the use made by W. of the money. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1843.** Also *held*, that no notice to defendant, of the acceptance of the guaranty, was necessary. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1844.** Also *held*, that the statute of limitations did not begin to run against the guaranty from the date of the first loan under it; that every authorized renewal of the first advance kept alive the indebtedness, and so as to every authorized subsequent advance. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1845.** Also *held*, that the liability created by the guaranty, being that of a firm, was joint, and that notice to the bank of the dissolution of the firm determined its right to loan on the faith of the guaranty, or to make further renewals of existing obligations. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1846.** The said State bank, after loans had been made to W., upon



the faith of the guaranty, abandoned its State organization, and was reorganized as a national bank, as authorized by the act of 1865 (chap. 97, Laws of 1865.) A portion of said loans had not been paid, new notes having been given in renewal. *Held*, that for whatever sum the defendant was bound to the State bank, when it was reorganized, that indebtedness passed to plaintiff; and, conceding that plaintiff could not renew without the assent of defendant, or make fresh advances and still hold him liable, it had the right to enforce the liability to the State bank. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1847.** It appeared that defendant knew of, and assented, in writing and orally, to the renewal. *Held*, that he was concluded thereby from claiming that the sureties were discharged by extension of time. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1848.** The complaint averred that the guaranty was to the plaintiff instead of to its predecessor, the State bank. The complaint was dismissed on trial. It did not appear that the failure to sustain the complaint by proof, in this respect, was made or relied upon at the trial. *Held*, that while, if the point had been specifically taken, and the dismissal had been placed upon that ground, and there had been no motion made and denied for an amendment, the ruling might be sustained, it could not be presumed that the trial court placed its decision upon a ground so little affecting the merits. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

**1849.** Also *held*, that, conceding the statute of limitations was a bar to an action against K., the bar did not apply in favor of defendant because of his admission, in writing, of the continuance of the indebtedness (Code of Procedure, § 110; Code of Civil Procedure, § 395); and, although the original obligation was joint, defendant's individual action has continued the liability, or created a new one against him alone. *City Nat. Bank v. Phelps*, 86 N. Y. 484.

## HOMESTEAD.

**1850.** Under the Code of 1851 and Revision of 1860, the homestead could be sold only to supply a deficiency existing after exhausting the other property of the debtor liable to execution, whether the debt existed before the purchase of the homestead, or was contracted afterward and secured by mortgage on the homestead. A mortgage upon the homestead was of no validity unless both husband and wife united in the execution and the record of it, therefore, imported no notice to a subsequent purchaser. *Higley & Co. v. Millard, et al.*, 45 Iowa, 586.

**1851.** A mortgage on property exempt under the homestead act cannot be enforced; and the owner of such property may sell the same *free from the mortgage* he has imposed on it. *Jacob C. Van Wickle v. Acée Landry*, 29 La. 330.

**1852.** A deed in ordinary form, executed by husband and wife, which contains no waiver of the homestead right, is sufficient to pass the title of the grantors to lands occupied by them as a homestead under the act to provide homesteads in Colorado (R. S. 285.) *Drake v. Root*, 2 Colo. 685.

**1853.** A claim for homestead exemption, in order to avail against a debt, must rest upon a deed executed anterior to the creation of the debt. (Wagn. Stat. 698, § 7.) *Lincoln v. Rowe*, 64 Mo. 138.

**1854.** Unless one abandons his homestead right in a house, he does not lose it by living temporarily in a rented house, especially if he has left part of his furniture in it. So *held*, where the owner was absent on business for two years and kept his family with him. The duration of a man's absence from his own house does not of itself supply a conclusive presumption that he has abandoned it as a homestead. *Bunker v. Paquette*, 37 Mich. 79.

## HUSBAND AND WIFE.

**1855.** When a wife executing a mortgage at the instance and upon the representations of her husband, will not be permitted to avoid the same on the ground of deception, or mistake. It is the right of the wife to demand that every paper presented to her for her signature be fully read and explained to her; and if she omits to claim or exercise such right, and executes the paper solely upon the representations of her husband, she does so at her peril. *Roach v. Karr*, 18 Kan. 529.

**1856.** A husband, having reduced to his possession funds to which he became entitled in right of his wife, cannot subject them to a voluntarily trust for the wife to the prejudice of his creditors. *Russell, et al. v. Thatcher, et al.*, 2 Del. 320.

**1857.** The husband becomes the absolute owner of the wife's legacy, and may dispose of it. *Jacks v. Adair*, 31 Ark. 616.

**1858.** A husband cannot loan money to his wife, both being insolvent. All property is held subject to the payment of the debts of



the owner, except in so far and to the extent only that it has been specifically exempted. The income derived from the homestead is not likewise exempt from liability for the owner's debts, and all acquisitions of property derived from such income are subject to sale under execution against the debtor; and the same is true of the natural increase of personal property set apart to the debtor as exempt from sale under execution. The homestead law does not vest in the owner any new rights of property; it only imposes a restriction upon the creditor that in seeking satisfaction of his debts, he should leave to the debtor untouched five hundred dollars of his personal and one thousand dollars of his real estate. *Citizens' Nat. Bank v. Green*, 78 N. C. 247.

**1859.** A bill was filed against a *feme covert* and her trustee for the purpose of charging her separate estate with a lien for materials furnished by the complainants for the improvement of the same; the bill did not aver that there was any contract by her to bind her separate estate, or any intention on her part to create a charge or specific lien thereon for the payment of the complainant's claim. On demurrer to the bill, it was *held*, that the bill stated no case entitling the complainants to relief in equity, and that the demurrer be sustained. In order to charge the debts contracted by a married woman upon her separate estate as a lien in equity, it is necessary that it should affirmatively appear, that her contract was made with direct reference to her separate estate, and that it was her intention to charge the same. *Wilson & Hunting v. Jones, et al.*, 46 Md. 349.

**1860.** When a conveyance is made by a husband, through a third person, to his wife, which is fraudulent as to the creditors of the husband, and the wife is a party to the fraud, she is not entitled to protection for any sum paid or liability incurred by her; the conveyance is absolutely void, and is not permitted to stand as security for any purpose of indemnity or reimbursement. *Davis v. Leopold*, 87 N. Y. 620.

**1861.** The common-law rule that where land is deeded to husband and wife, they each become seized of the entirety, and on the death of either the whole survives to the other, was not abrogated by the acts in relation to married women. *Zornlein v. Bram*, 100 N. Y. 12.

**1862.** It seems, also, that said rule was not done away with by the act of 1880 (chap. 472, Laws of 1880), allowing the husband and wife to make division between themselves of land so held. *Zornlein v. Bram*, 100 N. Y. 12.

**1863.** Before assignment of dower, a widow has no estate in the lands of her husband; her right is a mere *chose* in action. *Ackman v. Harsell*, 98 N. Y. 86.

**1864.** The receipt by the widow of one-third of the rent of real estate, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower, or bar her action thereon. *Ibid.*

**1865.** To constitute an assignment of dower, by agreement or specific act of the widow, it should be clearly manifest that such was the intention. *Ibid.*

**1866.** No particular phraseology is necessary to create a separate estate for a *feme covert*. In whatever language expressed, if there is

a clear intent of the parties to create the estate it is created. *Prouty v. Roby*, 15 Wall. U. S. 471.

**1867.** A married woman has the same power as a *feme sole* to pledge rents settled in trust for her to receive, take and enjoy them to her sole and exclusive use and benefit. *Cheever v. Wilson*, 9 Wall. 108.

**1868.** Under a conveyance to a husband and wife jointly, they take, not as tenants in common or as joint tenants, but as tenants by the entirety, and upon the death of either, the survivor takes the whole estate. *Bertles v. Nunan*, 92 N. Y. 152.

**1869.** To secure the joint bond of a husband and wife they executed their mortgage to C. upon lands owned by the wife alone. She thereafter conveyed the mortgaged premises to her son who, in an action to foreclose the mortgage, brought by an assignee of the mortgagee, interposed the defence of usury; the mortgagors did not defend. The mortgagee died previous to the trial. This took place in 1878, when the original section 830 of the Code of Civil Procedure was in force, which provided in substance, that where a party cannot be examined as a witness concerning a transaction with a deceased person under section 829, the husband or wife of said party cannot be examined concerning the same transaction. Upon the trial the son called his father, who negotiated the loan with the mortgagee, as a witness solely in his own behalf, to prove the usury. *Held*, that as the mother, to whose title the son succeeded, would have been precluded from testifying in his behalf as to the transaction with the deceased, the testimony of the father was properly excluded. *Whitehead v. Smith*, 81 N. Y. 151.

**1870.** The personal acquisitions of a wife, in Georgia, being by statute of that State not subject to the debts of her husband, her separate earnings from her individual labor and business carried on with his assignees in bankruptcy. *Glenn, et al. v. Johnson, et al.*, 18 Wall. U. S. 476.

**1871.** Covenants for wife's separate maintenance, through trustees, valid; and not the less so because containing a provision looking to reunion. *Walker v. Walker*, 9 Wallace, U. S. 743.

**1872.** Husband may be chargeable as trustee for his wife for her separate income received by him for investment and not invested. *Ibid.*

**1873.** Where, at the time of the execution of a promissory note, in the usual form, by a married woman, she executes another paper appended thereto, declaring her intent to charge her separate estate with the payment of the note, the two instruments are to be construed as one, and the note may be enforced against her. *Treadwell v. Archer*, 76 N. Y. 196.

**1874.** Deposit by husband in name of wife belongs to her. *McGraw v. Tatham*, (Mem.) 84 N. Y. 677.

**1875.** In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene. *Smith, et al. v. Vodges Assignee*, 92 U. S. 183.

**1876.** Property conveyed to the wife, for which payment was made out of the husband's property is not liable to be taken under the



provisions of R. S. c. 61, § 1, upon an execution recovered against the husband upon several debts, some of which accrued before and some after the conveyance. When a creditor unites two classes of claims against his debtor in one suit, and obtains judgment therein upon them, he reduces that in which his rights are superior to the level of that in which they are inferior. *Reed v. Woodman*, 4 Me. 400; also, *Usher v. Hazeltine*, 5 Me. 471; *Miller v. Miller*, 23 Me. 22; *Quimby v. Dill*, 40 Me. 538; *Holmes v. Farris*, 63 Me. 318.

**1877.** The other creditors of a husband cannot complain that he prefers to discharge a debt to his wife rather than those to them, nor will the relation of the parties, nor the fact that her claim is barred by the statute of limitations, be conclusive evidence of bad faith. *French v. Motley*, 63 Me. 326.

**1878.** In an action against husband and wife for necessities furnished on the credit of the wife, the plaintiff, in order to recover judgment, need not prove that the husband has no property or is insolvent or refuses to support his family. To recover judgment against the husband, it is necessary only to prove that the debt was contracted by the wife for necessities for the support of the family of the husband and wife. *Rigoney v. Nieman*, 73 Penn. 330.

**1879.** A wife may mortgage her estate to secure future as well as present indebtedness of her husband. *Haffey v. Carey*, 73 Penn. 431.

**1880.** Husband and wife are incapable of contracting with each other. *Pillow v. Wade and wife, et al.*, 31 Ark. 678.

**1881.** A voluntary conveyance of land made by a husband to his wife, through the intervention of a trustee, will not be held void as to future creditors on the mere ground that the husband subsequently became insolvent. Such conveyance will be set aside at the suit of a subsequent creditor, only on proof that it was made with intent on the part of the grantor thereby to defraud such subsequent creditor or creditors. One having a valid cause of action, sounding in tort, against such grantor at the time of such conveyance upon which an action was subsequently brought and judgment recovered, is to be regarded as a *subsequent creditor*. *Evans v. Lewis*, 30 Ohio, 11.

**1882.** Personal *covenants* in the husband's mortgage do not bind the wife, although she joined in the mortgage of her husband's property. A wife's covenant in her husband's deed is a mere nullity. *Kitchell v. Mudgett, et al.*, 37 Mich. 81.

**1883.** Wife not liable for deficiencies on foreclosure of a mortgage from her husband and herself. *Howe, et al. v. Lemon, et ux.*, 37 Mich. 164.

## INDEMNITY.

**1884.** Where the owner of real estate, in consideration of the agreement of another to become an indorser, to a specified amount, of negotiable paper of the former, executes to the latter a mortgage on such real estate, to indemnify him against loss, not only from such future indorsements, but also from similar indorsements already made, such future indorsements, when made, relate back to the execution of such mortgage, and are valid liens against encumbrances placed upon the mortgaged property subsequently to the execution of such mortgage, by persons having either actual or constructive notice thereof, though such indorsements be made by the mortgagee subsequent to the placing of such encumbrances and with notice thereof. *Brinkmeyer v. Helbling*, 57 Ind. 435.

## INNOCENT HOLDERS AND PURCHASERS.

**1885.** An unrecorded deed passes the title of the grantor to the grantee, but to be valid against creditors and purchasers without notice, it should be acknowledged or proved, and lodged for record within the time prescribed by law. The protection of innocent purchasers in such cases, prior to the passage of the act of February 10, 1858, applied to purchasers from the grantor himself, but did not apply to purchasers from his heirs or devisee. *Dozier & Co. v. Barnett & Co.*, 13 Bush, Ky. 457.

**1886.** The judgment bonds of a county in the hands of innocent holders for value, with notice of their illegality for any cause, cannot be defeated by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent., and that the board of supervisors fraudulently omitted to interpose the defence when the warrants were sued upon. *The S. C. & St. P. R. R. Co. v. The County of Osceola, et al.*, 45 Iowa, 168, Beck, J., dissenting.

## INSURANCE.

**1887.** A policy of insurance should be construed most strongly against the insurer, and liberally in favor of the assured. *Brick & Co. v. Merchants' and Mechanics' Ins. Co.*, 49 Rowell, Vt. 442.

**1888.** When a policy of life insurance contains a clause declaring it void on failure of the assured to pay the annual premium on the day it falls due, to work forfeiture, it is not necessary for the insurer to give notice of intention to claim it, but on failure to pay at the time stipulated the policy becomes void because of the non-payment. Such conditions in a policy are not unreasonable or against public policy. *Roehner v. Knickerbocker Life Ins. Co.*, 18 Sickels, N. Y. 160.

**1889.** One who has the control of property, either as owner, con-



signee or agent, may affect an insurance thereon in his own name, on account of whom it may concern, loss payable to him; and, in case of loss, may maintain an action thereon. An overvaluation does not *per se* render a valued marine policy void; in the absence of fraud, accident or mistake, the valuation agreed upon is binding and conclusive, however largely in excess of the true value. *Sturne v. At. M. Ins. Co.*, 18 Sickels, N. Y. 78.

**1890.** The sale and assignment of a life policy, outstanding and valid, and containing no prohibition of such alienation, is good in Rhode Island, though made to one who has no interest in the life insured, provided such sale and assignment is a *bona fide* business transaction, and not a device to evade law. *Clark v. Allen*, 11 R. I.; also, *Trenton Mut. Life Ins. Co. v. Johnston*, 24 N. J. Law, 576; *Campbell v. Mut. Life Ins. Co.*, 98 Mass. 381.

**1891.** In every case of marine insurance there is an implied warranty, on the part of the insured, of seaworthiness, and if the vessel is not seaworthy, the policy will not attack. *Van Wickle v. Mech & Tr. Ins. Co.*, 91 N. Y. 350.

**1892.** This warranty is a condition precedent, the performance of which must be alleged and proved to entitle the insured to recover in an action on the policy. *Ibid.*

**1893.** Agreement of life insurance company to pay agent commissions on renewals, on a gross sum in lieu thereof, is terminated by dissolution of company. *Hepburn v. Montgomery*, 97 N. Y. 617.

**1894.** The law will not imply an unwritten contract which the parties themselves could not make without writing. *Chase v. Second Ave. R. R. Co.*, 97 N. Y. 384.

**1895.** Waiver of breach of condition at issuance of policy of insurance continues in favor of all renewals granted of such policy. *Kruger v. Western Fire & Marine Ins. Co.*, 72 Cal. 91.

**1896.** Proof that the assignee of a policy of life insurance caused the death of the assured by felonious means is sufficient to defeat a recovery on the policy. *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591.

## INTERLINEATIONS.

**1897.** It was said in *Stanberry v. Moore*, 56 Ill. 472, that the practice of making amendments by erasures and interlineations is a bad one, and ought not to be tolerated; that a paper thus disfigured ought to be stricken from the files. This, however, was not necessary to be said, as that matter was not a point of the case. The remark was only intended to indicate a better practice. *Garrity v. Wilcox, et al.*, 83 Ill. 159.

**1898.** A judgment to bear interest at ten per cent. per annum until paid was proper on a note bearing interest at the rate of ten per cent. per annum "from date until paid," the statute authorizing ten per cent. interest when the note was executed. *Crosthwait & Co. v. Misener*, 13 Bush, Ky. 543.

**1899.** When at the place of contract the rate of interest differs

from that at the place of payment, the parties may stipulate for either rate, and the contract will govern. *Cromwell v. County of Sac*, 96 U. S. 51.

**1900.** The bonds of a railway company were made payable on the first day of January, 1861, with interest, "at the rate of six per cent. per annum, payable half-yearly, at said treasurer's office, on the first days of July and January of each year after the first day of January, 1851, upon the surrender of the corresponding warrants hereto annexed." *Held*, that interest after maturity and the payment of all the coupons was recoverable by way of damages for the detention of money due, and should be computed at six per cent., without semiannual or other rests. *Ashuelot R. R. Co. v. Elliot*, 57 Hall, N. Y. 397.

**1901.** By the act of 1872 it was provided "that no greater rate of interest than six per centum per annum shall be recovered in any action except where the agreement to pay such greater rate of interest is in writing." The agreement in the note to pay eight per cent. should not be construed to extend beyond its maturity, especially in face of the stipulation, where the interest after maturity is treated as a penalty, not covered by the contract, and liable to be raised on a contingency. *Fisher v. Bidwell*, 27 Conn. 363; *Brewster v. Wakefield*, 22 How. 118; *Ludwick v. Huntzinger*, 5 Watts & Serg. 51.

**1902.** Upon the bonds of a railroad corporation received, by one who has advanced the money with which they were taken up, under an agreement that they were to be delivered to him uncanceled as security for the advances, as against the corporation are valid securities in the hands of the holder, and a mortgage upon the corporate property given to pay the bonds may be enforced for his benefit. *Union Trust Co. of N. Y. v. Monticello and Port Jervis R. R. Co.*, 18 Sickels, N. Y. 311.

**1903.** Where the contract does not fix the rate of interest to be paid after the maturity of the date, the law fixes the rate at six per cent. *Evans v. Chapel*, 13 Bush, Ky. 121.

## INTEREST.

**1904.** To an action for money loaned, and for interest upon money loaned and upon an account stated, a plea that the several promises were to pay interest at a greater rate than ten per cent. per annum, and that such promises were not in writing, is bad. If upon payment of the principal sum due on a promissory note, the maker promises to pay interest due on the same note at a future day, and the payee thereupon cancels the note, and deliver it to the maker, to enable the latter to show it to other parties with whom he has dealings, an action may be maintained upon such promise. *Hall v. King*, 2 Colorado, 711.

**1905.** When both parties lived in Virginia during the war, the creditor is entitled to war interest. *Johnston, Trustee, Etc. v. Wilson's Adm'r, et al.*, 29 Grattan (Va.) 379.

**1906.** *Sureties liable* for interest as damages in an action upon an official bond. Interest upon the balance due from the principal was



properly allowed from the date when he rendered his account. *Jenness v. City of Blackhawk*, 2 Colorado, 578.

**1907.** Ten per cent. interest for discounts on loans can be taken under the general banking law of Michigan (Comp. L. § 2185.) *Cameron, et al. v. Merchants' & Manufacturers' Bank*, 37 Mich. 240.

**1908.** Where ten per cent. interest is exacted, the rate need not be expressly stated in writing; it is enough if the contract clearly expresses the sum to be paid. The statutory requirement that stipulations for ten per cent. interest shall be in writing was meant to prevent ambiguity as to what interest was to be paid, and to conform to the rule rejecting parol explanations of writings. *Ibid.*

**1909.** A promissory note was made in 1872, with interest payable semiannually at the rate of eight per cent. per annum, which was then legal. The note was given for a loan made by a corporation, and was intended to run for several years. In 1875 an act was passed limiting the rate of interest in Connecticut for money loaned to seven per cent. *Held*, that eight per cent. continued to be the legal rate of interest upon the note, after the act was passed, and until the note was paid.

**1910.** The note was given by a husband and wife and secured by a mortgage of her land. The husband at the same time signed a paper agreeing to an increase of interest so long as any interest remained unpaid, and to a foreclosure if it remained unpaid sixty days after due. *Held*, that this paper was admissible for the purpose of showing that a permanent loan was intended. *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300.

**1911.** The act of April, 1873, Code of 1873. ch. 173, § 14, p. 1120, which authorizes the abatement of war interest upon debts contracted before the 10th of April, 1865, is unconstitutional and void; and a creditor residing in Virginia during the war is entitled to have interest upon his debt. *Pretlow v. Bailey's Ex'r, et al.*, 29 Grattan (Va.) 212.

**1912.** In a state where the law allows as high as ten per cent. per annum interest, a decree will not be reversed, because it allows against a fraudulent administrator eight per cent. with annual rests. *Hook v. Payne*, 14 Wall. U. S. 252.

**1913.** A provision in a judgment of another state or territory, allowing interest on the amount thereof at a rate specified, does not control where suit is brought upon the judgment in this state, as the increase is allowed, not as interest but as damages, its measure must be that of the state where the action for its recovery is brought. *W. F. & Co. v. Davis*, 105 N. Y. 670.

**1914.** Interest is not allowable in an action for the breach of a contract, if the damages sought to be recovered are so unliquidatable and uncertain that they must be made certain by proof and adjudication. *Coburn v. Goodall*, 72 Cal. 498.

**1915.** When, at the time of an agreement for a loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute; to increase or alter it, a special agreement is necessary, and where the defence of usury is interposed, the burden of showing that such an agreement was made is upon the defendant. *Guggenheimer v. Geiszler*, 81 N. Y. 293.

**1916.** It was stipulated in plaintiff's mortgages which were exe-

cuted prior to the passage of the act (chap. 538, Laws of 1879) reducing the rate of interest to six per cent., that the principal sum should bear interest at seven per cent. until paid. By the decision and judgment entered thereon, interest was directed to be paid on the amount found due, from the date of the decision, at the rate of seven per cent. *Held*, error; that after entry of judgment the mortgages were merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgages, but of the judgment; and so, that the interest should have been at the lawful rate. *Taylor v. Wing*, 84 N. Y. 471.

**1917.** An allowance for the failure to pay at maturity money due by contract, is regarded as damages for the breach of contract, not as interest on the money due. The measure of such damages is the value of the use of the money during the time for which it has been withheld. The stipulation of the parties as to the rate of interest after maturity may be accepted as the measure of damages, provided they adhere to what may be reasonably sufficient to compensate the loss arising from the breach of contract.

**1918.** If, however, the rate of interest specified in the contract greatly exceeds the real value of the money, it is to be regarded as a penalty for non-payment of the principal sum, rather than a just recompense for detaining it.

**1919.** In the absence of evidence as to the current rate of interest at the time the contract was made, the rate specified in the contract may be accepted as the true measure of damages. *Browne v. Steck*, 2 Colorado, 70.

**1920.** *Compound Interest* is never allowed, except in special cases; as, where there has been a settlement of accounts, after interest has become due; or there has been an agreement for that purpose, subsequently to the original contract; or a master's report, computing principal and interest, has been confirmed. *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Stoughton v. Lynch*, 2 Johns. 209.

**1921.** C. and P. executed their single bill, dated October 18, 1871, whereby they promised "six months after date to pay to H. or order the sum of seven thousand dollars, with interest at the rate of 12 *per centum per annum* from date." *Held*, 1. The contract for interest at the rate of 12 *per cent. per annum*, was legal under the constitutional provision in force at the time of the contract, and is not affected by the subsequent abolition of that provision. 2. The obligors in the bond are bound to pay interest after the rate of 12 *per cent. per annum*, not only up to the maturity of the bond, but after maturity and until the payment thereof. *Cecil & Perry v. Hicks*, 29 Grattan (Va.) 1.

**1922.** An agreement, made at the time of the original loan, that interest shall be compounded, in case of default in paying it when due, is not valid. *Van Bemschooten v. Lawson*, 6 Johns. Ch. 313; also, *Van Rensselaer v. Jones*, 2 Barb. N. Y. 643.

**1923.** Where a promise is made to pay in labor and material in annual payments, interest does not begin to run until the year is completed in which any given payment is to be made, and the debtor is in default. *Fredenburg, Adm. v. Turner, et al.*, 37 Mich. 402.

**1924.** When interest is made payable annually upon a fixed date, the fact that the first instalment falls due *within* a year is not a



departure from the terms. *Griffin, et al. v. Johnson, et al.*, 37 Mich. 87.

**1925.** Upon a guaranty indorsed upon a promissory note, the interest specified in the note, as well as the principal sum, may be recovered. *Martin v. Hazard Powder Co.*, 2 Colorado, 569.

**1926.** A promise to pay on demand £200, with interest, is a promise to pay interest from the date of the note. *Baxter v. Robinson*, 2 Rev. de Leg. 439, K. B. 1816.

**1927.** A note which contains the following as to the interest, viz: "With interest at the rate of sixteen per cent. per annum from date," bears the legal and not the conventional rate of interest, after maturity. *Newton v. Kennerly*, 31 Ark. 626.

**1928.** By the statute of 1869-70, p. 699, accounts draw interest only from the day on which they are settled, and a balance is ascertained. *Bank of California v. Northam*, 51 Cal. 387.

**1929.** A depositor in a national bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit. The interest being a liquidated sum at the time of the payment of the deposit, an action lies to recover it, and interest thereon. *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 U. S. 437.

**1930.** The holder of coupons attached to town bonds, where the latter recite that they are issued in pursuance of a duly authorized subscription for stock of a railroad company, which before the subscription was actually made had become consolidated with another, thereby forming a third company, and the authority to subscribe was limited to the first company, is not entitled to recover thereon, as sufficient notice of the objection to the validity of the bonds is contained in their recitals. *Harshman v. Bates County* (2 Otto,) U. S. S. Ct. 92, 569.

**1931.** In order to entitle a creditor to interest on a debt from the time when the debt was payable, if such debt be payable by virtue of some written instrument at a certain time, it is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event be fixed, the date of which can be ascertained afterward. *Duncomb v. Brighton Club and Norfolk Hotel Company*, 10 L. R. Q. B. 371; 44 L. J. Q. B. 216; 23 W. R. 795; L. T. N. S. 863.

**1932.** Interest where allowed, not under contract, but by way of damages, the rate must be according to the *lex bori*. *Goddard v. Foster*, 17 Wall. U. S. 124.

**1933.** Where interest as a general thing is due and there is no statute in the place where the account is settled and the transaction takes place, giving interest, in such case it is to be allowed at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character as the one on which the suit arises, by way of damages for unreasonably withholding an overdue account. *Young v. Godbe*, 15 Wall. U. S. 562.

**1934.** A party suing, not on a note, but on the consideration for which the note was given—and using the note as evidence rather than as the foundation of the claim—may have lawful interest on the sum due him although by note given on a settlement the party may have

promised to pay unlawful interest, and such as the law of the state where the note was given visits with a forfeiture of all interest whatever. *Newell v. Nixon*, 4 Wall. U. S. 572.

**1935.** A prohibition against lending money at a higher rate of interest than the law allows will not prevent the purchase of securities at any price which the parties may agree upon. *Ibid.*

**1936.** Compound interest is not usury; nor is a stipulation in an original contract that the interest shall be compounded if not punctually paid, either illegal, immoral, or contrary to public policy; nor, *a fortiori*, is such an agreement; much less will it interfere after judgment at law founded upon the agreement. (Cited in *Ward v. Brandon*, 1 Heisk. 493.) *Hale v. Hale*, (1 Caldwell) 41 Tenn. 233; also, *Mowry v. Bishop*, 5 Page. N. Y. 98.

**1937.** Whether a negotiation of securities is a purchase or a loan, is ordinarily a question of fact; and does not become a question of law until some fact be proven irreconcilable with one or the other conclusion. *Galveston Railway v. Cowdrey*, 11 Wall. U. S. 459.

**1938.** Though the negotiation of one's own bond or note is ordinarily a loan in law, yet if a sale thereof be authorized by an act of the legislature it becomes a question of fact, whether such negotiation was a loan or a sale. *Ibid.*

**1939.** Interest is due on coupons, after payment of them is unjustly neglected or refused. *Aurora City v. West*, 7 Wall. U. S. 87.

**1940.** Interest is not allowable as a matter of law, in cases of tort. Its allowance as damages rests in the discretion of the jury. *Lincoln v. Claflyn*, 7 Wall. U. S. 132.

**1941.** Interest is, apparently, not sanctioned by the Supreme Court on claims against the government. *Gordon v. United States*, 7 Wall. U. S. 188.

**1942.** Interest in mutual accounts is to be cast on the annual balances. *Davis v. Smith*, 48 Vt. 52.

**1943.** Interest on a note payable on demand runs only from demand, or suit brought, and the fact that the note was given for money received at the time it was made does not change the rule. Suit on a note payable on demand may be brought without a previous request for payment, the suit itself being equivalent to a demand. *Hunter v. Wood*, 54 Ala. 71.

**1944.** Interest at the rate of only six per cent. can be recovered where no rate of interest is agreed upon between the parties. *Convey v. Sheldon*, 1 Bradwell's, Ill. App. Rpts. 555.

**1945.** As to parties holding simply the relation of creditor and debtor, compound interest will not be allowed. *Force v. Elizabeth*, 28 N. J. Eq. 403.

**1946.** On a note payable on demand, with the rate of interest specified therein, interest is to be computed at such rate till the rendition of verdict, or default. *Colby v. Bunker*, 68 Me. 524.

**1947.** As a mere incident, interest on interest is not allowed, but a promise to pay it is not illegal or without consideration; and the weight of authority is perhaps in favor of the validity of the promise, at law, whether made at or subsequent to the original contract. *Pauling v. Creagh*, 54 Ala. 646.

**1948.** A note bearing interest over ten per cent. per annum, from



due until paid, carries the stipulated interest to the date of the judgment, and the judgment bears ten per cent. *Budgett v. Jordan*, 32 Ark. 154.

**1949.** A note which contains a stipulation for interest, at the rate of ten per cent., etc., from date, bears six per cent. interest (the legal rate) after maturity, and a judgment thereon should bear six per cent. interest. *Pettigrew v. Summers*, 32 Ark. 571.

**1950.** A note which stipulates for interest from date until maturity, at the rate of ten per cent. per annum, bears the statutory rate (six per cent.) after maturity. *Woodruff v. Webb*, 32 Ark. 612.

**1951.** Only legal interest will be allowed when a larger interest is not stipulated in writing. *Buckley v. Seymour*, 30 La. 1341.

**1952.** On a note payable on demand, with interest at ten per cent., that rate of interest is recoverable up to the date of the verdict, when damages are assessed by a jury, and up to the date of judgment when a default is entered in a suit on the note. *Paine v. Caswell*, 68 Me. 80.

**1953.** When a note contains a stipulation for interest, at the rate of ten per cent. per annum until maturity, and two per cent. per month after maturity, the increased interest after maturity cannot be treated as a penalty. When judgment is recovered on a note, the contract is merged in the judgment, and it bears statutory rate of interest. *Miller v. Kempner*, 32 Ark. 573.

**1954.** A loan of money was made for two months at two per cent. a month, at the expiration of which time it was contemplated a new arrangement would be made. After the expiration of the two months, no other arrangement having been effected, the court held the lender entitled to claim interest at the rate originally agreed upon, and to sell the notes held by him as security, to repay himself the amount of his claim, subject only to the question whether he had sold the notes for the best price that could be obtained for them; and as to which the court directed an inquiry by the Master. *O'Connor v. Clarke*, 18 Grant, Ontario Chaney. 422.

**1955.** One to whom money is paid, and who receives it believing that it is his due, is not liable for interest upon it before demand made and refusal to pay, nor until he shall have reason to be satisfied that he ought to repay it, and shall know to whom he should pay it. *Ashhurst v. Field*, 28 N. J. Eq. 315.

**1956.** Interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there is a surplus, it is applied upon the principal, and so *toties quoties*, taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. *Davis v. Neligh*, 7 Neb. 78.

**1957.** When interest is recoverable merely as damages, an action cannot be maintained for its recovery, after payment of the principal. This, when a bequest or contract is silent as to interest, so that, if it can be recovered at all, it can only be recovered as damages, an action to recover it cannot be maintained after the payment of the principal. *American Bible Soc. v. Wells*, 68 Me. 572.

**1958.** In the absence of a written agreement, by the defendant, to pay eight per cent. per annum interest, only legal interest can be recovered. *Bayly & Pond v. Stacey & Poland*, 30 La. 1210.

**1959.** The condition of a mortgage, dated June 28, 1871, was that the principal should be paid on April 1st, 1873, "with interest annually on the first day of April in each year." An action was commenced to foreclose the mortgage December 23, 1872, upon the ground of default in the payment of interest alleged to have become due April 1, 1872. *Held*, that by the stipulation as to interest reference was had to, and it was intended to provide for a payment of interest prior to the time when the principal became due, and that plaintiff's claim was well founded. *Cook v. Clark*, 68 N. Y. 178.

**1960.** When a party agrees by note to pay a certain sum at the expiration of a year, with interest on it at a rate named, the rate being higher than the customary rate of the State where he lives, and does not pay the note at the expiration of the year, it bears interest, not at the old rate, but at the customary or statute rate. *Burnhisel v. Firman*, 22 Wallace (U. S.) 170. If, however, the parties calculate interest, and make a settlement upon the basis of the old rate, and the debtor gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bankrupt Act, and of any statute making such certificates void in *toto* as usurious, valid securities for the amount which would be due on a calculation properly made. They are bad only for the excess above proper interest. *Ibid.*

**1961.** Under the provisions of the Banking Act of 1870 (chap. 163, Laws of 1870), prohibiting banks from charging upon any discount a rate of interest greater than seven per cent., and in case a greater rate of interest has been paid, authorizing a recovery by the party paying it of twice the amount, it is not necessary that the payment should be made in money to subject the receiver to liability. *Nash v. White's Bank of Buffalo*, 68 N. Y. 396.

**1962.** When commercial paper is transferred to and discounted by a bank at a greater rate of interest than seven per cent., and the net proceeds, after deducting the interest charged, are credited to the transferor, this is a payment within the meaning of the statute. The fact that the paper discounted is business paper, so that the purchase thereof is not usurious under the general statutes, does not relieve from liability under said act. *Ibid.*

### IRREGULARITY.

**1963.** A party consenting to a proceeding which he might prevent by resisting it on account of irregularity, thereby waives all exception to such irregularity. *Patton v. Hughesdale*, 11 R. I. 188.



## JOINT DEBTORS.

**1964.** The provision of the Code of Civil Procedure (§ 758), providing that the estate of one jointly liable with others shall not be discharged by his death, does not affect contracts entered into before its passage. The provision is not merely remedial, as it imposes, in some cases, an obligation where none existed before. *Randall v. Sackett*, 77 N. Y. 480.

## JUDGMENT.

**1965.** The reversal of a judgment destroys its efficacy as an estoppel. *Smith v. Frankfield*, 77 N. Y. 414.

**1966.** After the satisfaction of a judgment in favor of plaintiff it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided. *Hatch v. Centl. Nat. Bank*, 78 N. Y. 487.

**1967.** The validity of a claim upon which a judgment has been rendered, cannot be questioned in an action by the judgment-creditor to reach property alleged to have been transferred by the debtor in fraud of his creditors; the judgment is conclusive. *Decker v. Decker*, 108 N. Y. 128.

**1968.** The fact that a transfer of a debtor's property, with intent to defraud his creditors, is accomplished through the agency of a valid judgment lawfully enforced, does not alter its fraudulent character or enable it to defy justice. *Decker v. Decker*, 108 N. Y. 128.

## JUDICIAL NOTICE.

**1969.** It seems that the court will take judicial notice of the nature of the business and the office of mercantile agencies. *Eaton C. & B. Co. v. Avery*, 83 N. Y. 61.

**1970.** The courts will take judicial notice of the general course of business in a community, including the universal practice of banks. *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338.

## JUDICIAL SALES.

**1971.** A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (§ 184, sub. 4), and an advertisement of the premises for sale is a "seizure" within said provision. *Un. D'tme Svgs. Instn. v. Anderson*, 83 N. Y. 174.

**1972.** Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, adver-

tised premises for sale upon a day after his term had expired, *held*, that he had authority and was bound to proceed with and complete the sale. *Un. Dime Svgs. Instn. v. Anderson*, 83 N. Y. 174.

### JUDGMENT.

**1973.** In the absence of fraud, a judgment takes effect only on the actual interest in land which the judgment debtor has at the time of the recovery of the judgment. *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 221.

**1974.** The title therefor of a grantee of the judgment debtor, by deed executed before the entry of judgment, although unrecorded, takes precedence of the judgment. *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 221.

**1975.** The fact that such grantee has not recorded his deed creates no equity in favor of the judgment debtor. *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 221.

**1976.** Although the recital in a judgment-roll, in an action of foreclosure, of service of process upon, and of appearance by, a defendant, is not conclusive, and evidence is admissible on the part of a defendant in an action brought to foreclose a mortgage to show that the court never acquired jurisdiction of his person, every intendment is in favor of the validity of the judgment, if regular on its face; the burden of establishing want of jurisdiction is upon the party so questioning it, and it should be established in the most satisfactory manner to deprive the judgment of its effect. *Ferguson v. Crawford*, 86 N. Y. 609.

**1977.** The legal title to a judgment recovered in an action brought by the surviving member of a firm, in his name as survivor, is in the plaintiff the same as if the cause of action had stood in his own right. *Nehrboss v. Bliss*, 88 N. Y. 600.

**1978.** When securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien upon the securities for a general balance or for the payment of other claims. *Wychoff v. Anthony*, 90 N. Y. 442.

**1979.** Under the Code of Procedure a money judgment, against a non-resident upon whom there was no personal service of summons, but service was made by publication, and who did not appear in the action, cannot affect any property of the defendant except such as has been taken by virtue of an attachment regularly issued in the action. *McKinney v. Collins*, 88 N. Y. 216.

**1980.** Accordingly *held*, that a sale of real estate belonging to the defendant under an execution issued in an action against a non-resident wherein the service of the summons was by publication, and no attachment had been issued, gave no title to the purchaser. *McKinney v. Collins*, 88 N. Y. 216.



## JURISDICTION.

**1981.** A General Term of the Supreme Court has power to amend its record, after an appeal to this court, by inserting in an order of reversal that its decision was made upon questions of fact. *Guernsey v. Miller*, 80 N. Y. 181.

**1982.** Where a court, authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. *Risley v. Phenix Bank*, 83 N. Y. 318.

## LACHES.

**1983.** As a proceeding to vacate an assessment is a special proceeding, it is governed by the limitation prescribed by the Code of Civil Procedure (§§ 388, 414), and a delay in moving, for a less time than there limited, is not fatal to the proceeding. *In re Manhat. Svgs. Instn.*, 82 N. Y. 142.

**1984.** A promissory note dated July 21, 1874, was by its terms made "payable on demand after date" at a bank, with interest "after maturity." The note was indorsed and transferred by the payee on the day of its date. It was presented for payment on the first and fourth days of February, 1878, payment demanded and refused, and on the fourth it was protested and the indorser notified. In an action upon the note, *held*, that it was the intent of the parties that the note should be presented for payment, if not immediately, at least within a very short time; and that the delay in this case was such as to dishonor the note, and the indorser was discharged. *Crim v. Starkweather*, 88 N. Y. 339.

## LAPSE OF TIME.

**1985.** Trustee and *cestui que trust*.—Lapse of time does not bar a direct trust as between the trustee and *cestui que trust*. Otherwise as to constructive trusts. *Castwell, Adm'r v. Perkins*, 2 Del. 102.

## LEASE.

**1986.** A lease to a corporation is not terminated by its dissolution, and its covenant to pay rent does not thereupon cease to be obligatory. *People v. Nat. Trust Co.*, 82 N. Y. 283.

**1987.** The words "grant" and "demise" in a lease for years cre-

ate an implied warranty of title and a covenant for quiet enjoyment, *Stott, et al. v. Rutherford*, 92 U. S. 107.

**1988.** A covenant in a lease giving to the lessee a right or option to purchase the premises leased at any time during the term, is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede. When accepted by the lessee a contract of sale is completed. *Willard v. Taylor*, 9 Wall. U. S. 557.

## LIENS.

**1899.** A lien is neither property nor a debt, but a right to have satisfaction for a debt and of property, and is not the subject of sale or assignment. *Roberts, et al. v. Jacks*, 31 Ark. 597.

**1990.** While the holder of a debt, secured by a lien, cannot transfer the lien to a stranger, without also assigning the debt, he may release it on claiming an interest, or a junior lien on the property. *Buckner v. McIlroy*, 31 Ark. 631.

**1991.** In exchanging one form of security for another for the same debt, no other lien can intervene and become paramount thereto. *Thorpe Brothers v. Durbon, et al.*, 45 Iowa, 192.

**1992.** Judgment entered on an assessment note, under the provisions of the charter of the People's Fire Insurance Company, is not a general judgment which may be enforced against any property of the insurer, but is restricted as a lien to the property insured. *Halfpenny v. The People's Fire Ins. Co.*, 85 Penn. St. 48.

**1993.** Where the note or other written obligation of a third person is taken by the vendor of real estate, he thereby waives his equitable lien. *Stevens v. Rainwater*, 4 Mo. Court of Appeals (St. Louis) 292.

**1994.** Workman under contractor restrained from filing his claim for lien by a promise of the owner of the property to pay him, may hold the owner answerable on his promise. *Andre v. Bodman*, 13 Md. 241.

**1995.** A judgment docketed, but not properly indexed, is a lien upon land in the hands of a subsequent purchaser, without notice. *Old Dominion Granite Co., et al. v. Clarke, et al.*, 28 Grattan (Va.) 617.

**1996.** A person cannot avail himself of a lien, of which he has been fraudulently prevented by his own acts. *Carey, et al. v. Brown*, (2 Otto) U. S. 92, 171.

**1997.** The lien on personal property secured by a levy is necessarily released when the levy is released, and a reservation of the lien is of no effect. *McConnell v. Denhon*, 72 Iowa, 494.

**1998.** An execution creditor with notice takes the property subject to any lien as equity that might be enforced against the judgment debtor. *Ibid.*

**1999.** Policy of law is against upholding secret liens and charges to the injury of innocent purchasers and encumbrances for value. *Palmer v. Howard*, 72 Cal. 293.



## LIMITATION OF ACTIONS.

**2000.** The provision of the Code of Civil Procedure (§ 382, sub. 5) limiting the time for the commencement of "an action to procure a judgment other than for a sum of money, on the ground of fraud," includes all cases formerly cognizable by the Court of Chancery, whether its jurisdiction therein was exclusive or concurrent with that of courts of law, in which any remedy or relief is sought for aside from or in addition to a mere money judgment, and which a court of law could not give, although as part of the relief sought a money judgment is also demanded. *Carr v. Thompson*, 87 N. Y. 160.

## LOANS.

**2001.** Loan by a non-trader to a trader. In 1858, W. D., Sr., opened a credit of \$584 in favor of his daughter, J. D. with W. D. & Co., a commercial firm in Montreal, consisting of the appellant and one T. D., W. D. & Co., charging W. D., Sr., and crediting J. D. with the amount. In 1860, W. D., as sole executor of the will of D. D., credited J. D. in the books of W. D. & Co. (appellant at that time being the only member of the firm), with a further sum of \$800, the amount of a legacy bequeathed by such will. These entries in the books of W. D. & Co., together with entries of interest in connection with the said items, were continued from year to year. An account current was rendered to J. D., exhibiting details of the indebtedness up to the 31st December, 1861. After 31st December, 1864, the firm of W. D. & Co. consisted of the appellant and his brother, T. D. In December, 1865, another account was rendered to J. D., which showed a balance due her at that time of \$1,912.08. The accounts rendered were unsigned, but the record account current was accompanied by a letter, referring to it, written and signed by the appellant.

## MARKET PRICE.

**2002.** The market price of a marketable commodity may be determined as well by offers to sell, made by dealers in the ordinary course of business, as by actual sales; and statements of dealers in answer to inquiries as to price, are competent evidence. *Harrison v. Glover*, 72 N. Y. App. 451.

## MARRIED WOMEN.

**2003.** Where a husband left this State for California, leaving his wife in charge of his farm, and to manage the same, and during his absence the wife sold a horse, taking a note, payable to herself, for the price, and indorsed the same to a creditor of the husband in payment of his debt, and the husband, on his return, approved the same, it was held, that the wife's indorsement could be sustained on two grounds: an implied authority from her husband, and his subsequent ratification. *Mudge v. Bullock, Adm'r*, 83 Ill. 22.

**2004.** An answer of a married woman, made to an action by the indorser of a promissory note to charge her separate estate, on her indorsement thereof, which denies that she intended to charge her separate estate, and avers that she indorsed the same through the influence and persuasion of her husband, and not of her own free will, and that she received no part of the money paid for said note, but the same was used for the sole benefit of her husband, states a good defence to such action. The indorsement by a married woman of a promissory note, solely for the accommodation of her husband, and as surety thereon, in order to enable him to dispose of the same, is, of itself, not sufficient to warrant a court of equity in presuming that she intended to charge her separate real estate with the payment of the same. *Levi v. Earl*, 30 Ohio, 147.

**2005.** A married woman cannot bind herself by contract, under Gen. Stats. ch. 164, § 13, unless such contract is in respect to property held by her in her own right. *Blake v. Hall*, 57 Hall, N. H. 373. A contract by a married woman, for groceries sold to her upon her promise to pay for the same out of wages to be earned by her under a subsisting contract with a third party, is not a contract made by her in her own right, and therefore is not within the provisions of Gen. Stats. ch. 164, § 13. *Muzzey v. Reardon*, 57 Hall, N. H. 378.

**2006.** A promissory note given by a married woman and her husband for property purchased by her as sole trader, is valid in law, and the amount of such note may be recovered against the husband and wife in an action of assumpsit. *Barnes v. De France*, 2 Colorado, 294.

**2007.** The sale or mortgage by a married woman of her separate property for the payment of her husband's debts may be enforced. *Moore v. Fuller*, 6 Oregon, 272.

**2008.** At common law, the promissory note of a married woman is void. The constitution and statute of this State make no change in



this respect. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her. *Dollner, Potter & Co. v. Snow, et als.*, 16 Florida, 86.

**2009.** Where money is lent to a married woman, upon an agreement that it shall be applied to the use of her husband or his firm, she is not liable on a note given by her therefor prior to the St. of 1874, c. 184. *Nourse v. Henshaw*, 123 Mass. 96.

**2010.** In the case of a purchase by a wife during coverture, the burden is upon her to prove distinctly that she paid for the thing purchased with funds not furnished by her husband. Evidence that she purchased amounts to nothing, unless it is accompanied by clear and full proof that she paid for it with her own separate funds. In the absence of such proof, the presumption is, that her husband furnished the means of payment. *Rose & Co., et al. v. Brown, et ux.*, 11 W. Va. 122.

**2011.** Under the statute (Laws 1874, p. 185) a *femine covert* is no longer *sub protestati vivi* in respect to the acquisition, enjoyment, and disposition of real and personal property. She may do with her own property as she will, without reference to any other restraints or disabilities of coverture. She may make conveyance directly to her husband. The removal, in respect to the wife, of a disability that is mutual, and springing from the same source, removes it also as to the husband; and the husband may, acting in his own right, convey to the wife. *Wells v. Caywood*, 3 Colo. 487.

**2012.** Separate estate is presumed, in the absence of proof to the contrary, where a married woman signs a note or order for goods or money. *Wilcoxson v. State*, 60 Ga. 182.

**2013.** Married woman may give a mortgage upon her property to secure the payment of a debt due by her husband; and a mortgage executed by her for such purpose cannot be said to be without consideration. *Comegys v. Clarke and Comegys*, 44 Md. 108.

**2014.** Neither the pecuniary embarrassment, nor the actual insolvency of the husband, is any obstacle to a transfer by the husband to the wife, in good faith, for the replacing of her money, or property, used, or alienated by him. *Lehman, Abraham & Co. v. Levy*, 30 La. 745.

**2015.** A married woman, in the absence of fraud, or of knowledge thereof on the part of the beneficiaries in a trust deed, given on a *bona fide* consideration, cannot impeach the certificate of the officer taking her privy acknowledgment. *Williams v. Powers*, 48 Texas 141.

**2016.** A mistake in facts will always be remedied by the courts as far as can be done consistently with right and justice; but if the mistake is purely a mistake in law, they will not interfere. *Carpenter v. Jones, et al., Adm'rs*, 44 Md. 625.

**2017.** A clerical error in entering a consent decree may be corrected by the original draft of the decree, furnished the clerk by the court, on motion at any time, under the provisions of section 5 of chapter 134 of the Code. A consent decree, except where such clerical error has occurred, can never be modified or altered without the consent of parties, not even during the term at which it was entered. *Manion v. Fahy*, 11 W. Va. 482.

**2018.** When money is paid under a mutual mistake of law, the mistake of law is, in and of itself, no ground for recovering it back. *Galveston Co. v. Gorham*, 49 Texas, 279.

**2019.** Any mistake or misunderstanding between the persons conducting a judicial sale, and intended bidders or parties in interest, by which interests are prejudiced without fault of the injured party or parties, is sufficient cause for refusing confirmation and ordering a re-sale. *Hilleary, et al. v. Thompson, et al.*, 11 W. Va. 113. A suit brought by G. T., her husband and universal legatee, to recover the \$1,912.08, with interest, from 31st December, 1865: *Held*, (1) That a loan of moneys, as in this case, by a non-trader to a commercial firm is not a "commercial matter," or a debt of a "commercial nature"; that, therefore, the debt could be prescribed, neither by the lapse of six years under Consolidated Statutes of Lower Canada, ch. 67, nor by the lapse of five years under the Civil Code of Lower Canada, but only by the proscription of thirty years. *Whishaw v. Gilmour*, 15 L. C., R. 177, approved. (2) That, even if the debt of a commercial nature, the rendering of the account current, accompanied by the letter referring to it, signed by the appellant, would take the case out of the statute. (3) That the proscription of five years against arrears of interest, under Art. 2250 of the Civil Code of Lower Canada, does not apply to a debt the proscription of which was commenced before the code came in force. (4) That entries in a merchant's books make complete proof against him. *Darling v. Brown*, 1 Canada Supreme Co. 360.

**2020.** A receipt of a woman before taking out letters of administration by which surrendered for an inadequate consideration rights of herself and of her children, in her husband's estate, on which she afterwards took out administration, *held* void, as hastily and inconsiderately made, and when influenced by a friend, himself ignorant of many facts in the case. *Cammack v. Lewis*, 15 Wall. U. S. 643.

**2021.** As incident to the right given to married women by the act of 1862 (chap 172, Laws of 1862), to acquire property by purchase, she may purchase property, either real or personal, upon credit, and is personally liable for the purchase-price as if she were a *feme sole*; and this although she had no separate estate at the time of the purchase, and without regard to the question as to the purpose for which the transaction was made. *Tiemeyer v. Turnquist*, 85 N. Y. 516.

**2022.** It seems that when a married woman contracts such a debt as agent for her husband, she is not personally liable. The effect of the exception in the provision of the act of 1860 (§1, chap. 90, Laws of 1860), freeing the property of a married woman from the control of her husband, and making it her sole and separate estate, save as against debts contracted by her as the agent of her husband for the support of herself and her children, is simply to leave her property exposed to be taken for the debt so contracted as if the statute had not been passed, it does not make her personally liable for the debt. *Tiemeyer v. Turnquist*, 85 N. Y. 516.

**2023.** A married woman, although she carries on no business, and has no separate estate, is liable for a debt contracted in the leasing of real estate. *Ackley v. Westervelt*, 86 N. Y. 448.

**2024.** A contract implied by law, or inferred from the circumstances, is as effectual to bind a married woman as one expressly created. *Ackley v. Westervelt*, 86 N. Y. 448.

**2025.** Where, therefore, a married woman in possession of real



estate under a lease holds over after the expiration of her term, the law implies an agreement upon her part to a holding upon the terms of the lease, and the implied agreement is binding upon her. *Ackley v. Westervelt*, 86 N. Y. 448.

**2026.** It does not alter the character of the holding, or change or affect her liability, that she occupied the premises with her husband and family as a dwelling. *Ackley v. Westervelt*, 86 N. Y. 448.

**2027.** Plaintiff, in her own name, deposited a certain sum with defendant. In proceedings subsequently commenced against defendant, supplementary to an execution against plaintiff's husband, he, she and an officer of the defendant appeared before a referee and were examined. Upon the report of the referee an order was granted by the court before whom the proceedings were pending, requiring defendant to pay to the judgment creditor the amount of the deposit, which order defendant obeyed. In an action to recover the deposit it did not appear that plaintiff had notice of the application for the order, or that she was heard in reference thereto, or that she was in any way a party to the application. *Held*, that such payment was no defence; that she was not a party to the adjudication or bound thereby. *Schrauth v. Dry Dock Savings Bank*, 86 N. Y. 390.

**2028.** A married woman who is legal owner of personalty may sue at law one who takes it and converts it to his own use; and such a case is triable by jury. *Alt v. Meyer*, 8 Mo. App. 198.

### MARSHALLING SECURITIES.

**2029.** The assignee of certain mortgages, having a collateral security for money advanced upon the mortgages, was required for the benefit of junior creditors against the mortgaged property, first to exhaust his remedy upon the collateral security. A creditor having the security of two funds out of which he can satisfy his debt, upon one of which only another creditor has a junior lien, will be compelled in equity to resort first to the fund which the junior creditor cannot reach. *Logan, et al. v. Brick, et al.*, 2 Del. 206.

**2030.** A. held a mortgage on two tracts of land, B. also held a mortgage on one of the tracts; in a proceeding by A. to foreclose, B. sought to compel him to exhaust the tract not embraced in his mortgage first. The widow of the mortgagor, who was also a party, claimed a homestead in the latter tract. *Held*, that by reason of the widow's equity, the securities should not be marshalled. Where one creditor has a security upon two funds, another, having a security on one of them, may, if necessary to the protection of his security, compel the other to resort to the fund embraced in it, if it can be done without prejudice to the other creditors or injustice to the common debtor or third persons having an interest in the fund. *Marr v. Lewis*, 31 Ark. 203.

**2031.** The word "heirs" when applied to the succession of personal estate, means next of kin; the latter term refers to relatives by blood, and does not include a widow. *Tillman v. Davis*, 95 N. Y. 17.

## MISTAKES.

**2032.** Money paid under a mistake of a material fact may be recovered back although there was negligence on the part of the person making the payment, unless the position of the party receiving it has been changed in consequence thereof, and it would be inequitable to allow a recovery. If circumstances exist taking the case out of the general rule allowing a recovery, the burden of proving them rests upon the party resisting the repayment. *Mayer v. The Mayor*, 18 Sickels, N. Y. 455.

**2033.** Mistake is recognized as a sufficient ground upon which to decree the reform of a deed, but the courts exercise their power in this respect with great caution, and only upon very clear and satisfactory proof. *Mendenhall v. Steckell*, 47 Md. 453.

**2034.** The indorser, upon receiving notice of protest, sent the money to take up the bill. The holder, under an honest mistake, informed him that it was taken up; in consequence of which he was prevented from taking up the bill and collecting it from the drawer, who became insolvent. *Held*, that the holder could not afterwards recover from the indorser. He was estopped. That he made the misstatement in good faith makes no difference. The estoppel applies, not on the ground of wilful fraud in making the representation, but that showing the representation, to be true, to the prejudice of the indorser, would be a fraud. *Kingsley v. Vernon*, N. Y. Superior Court, 4 Sandf. 361.

**2035.** The defendant having several contracts, produced one of them, supposing it to be a different one, and settled with plaintiffs, under this mistake. *Held*, that under the circumstances he was not estopped from proving the truth of the case. *Young v. Bushnell*, 8 Bosw., N. Y. Superior Ct. 1850, 1.

**2036.** Although a party to a lease may be misnamed in the body of the writing, yet if he signs it, it is his contract, no matter by what name he is called in the body of the instrument. *Montanye v. Wallahan*, 84 Ill. 355.

**2037.** To avoid an agreement, must be a mistake, not of law but of fact, and it must be a plain mistake, clearly made out by satisfactory proof—not resting upon evidence loose, equivocal or contradictory. *Pickering v. Day*, 2 Del. 333.

**2038.** It seems that a mere inadvertent mistake, made by a bankrupt in stating the amount of a debt, will not avoid, as to the creditor, a composition made under and in pursuance of the act of Congress of June, 1874 (§ 17), amending the Bankrupt Act. *Beebe v. Pyle*, 71 N. Y. 20.

**2039.** In a suit to reform a deed, lands which were not included in the deed, but omitted by mistake, may be inserted in the deed as reformed. *Loomis v. Ramsey*, 6 Oregon, 368.

**2040.** A mistake as to legal rights is not a ground for equitable relief. *Weed v. Weed*, 94 N. Y. 243.

**2041.** The general jurisdiction of a court of equity to set aside or reform a contract on the ground of mistake includes executed as well as executory contracts; the consummation of the transaction, in



ignorance of the mistake and without laches on the part of the party injured, gives the other party no immunity from making recompense, nor does it deprive the court of the power to remedy the injustice. *Paine v. Upton*, 87 N. Y. 327.

**2042.** While parol evidence is admissible to show a mistake in a written agreement, yet to justify a reformation of the instrument on that ground, the mistake should be proved as much to the satisfaction of the court as if admitted. *Ford v. Joyce*, 78 N. Y. 618.

**2043.** Presumption that a customer's note, sent to bank for collection, was not paid by it through mistake, although customer had no funds; also when question of mistake is one of fact. *Whiting v. City Bank*, 77 N. Y. 363.

**2044.** When mistake which is not calculated to mislead will not work estoppel, although it does affect the conduct of a party to his injury. *H. M. Co. v. Farrington*, 82 N. Y. 121.

**2045.** In an action against a surety on a note of a corporation, it is immaterial that the security at the time supposed that the principal maker was a partnership, whose members were individually liable. *Bank of Monroe v. Gifford*, (14 Ebersole, Iowa,) 72 state reports, 750.

**2046.** In order to warrant a court of equity in reforming an instrument on the ground of mutual mistake, the proof of the mistake and that it was mutual must be clear. Where the complaint alleges mistake and asks relief on that ground alone, the court will not reform the instrument on the ground that one of the parties to it was guilty of a fraud in executing it. The complaint should point out the mistake and show in terms what the tenor of the instrument ought to be. It is not sufficient to say that it was the intention of the parties to make an instrument that would accomplish a certain object, and then ask the court to make a writing that will accomplish that object. The complaint should show the true contract in its terms. *Stephens v. Murton*, 6 Oregon, 193.

**2047.** Ignorance of a fact extrinsic and not essential to a contract but which if known might have influenced the action of a party to a contract is not such a mistake as will authorize equitable relief; as to such facts, the party must rely upon his own vigilance, and if not imposed upon or defrauded will be held to his contract. *Dambmann v. Schulting*, 75 N. Y. 55.

**2048.** Defendant in an action for conversion of property can only claim a mitigation of damages because of a return of the property where the owner has accepted its return or has resumed dominion over it as its owner. *People v. Bank of North America*, 75 N. Y. 548.

**2049.** Mistake to warrant a court of equity in reforming a written contract must be one made by both parties to the agreement so that the intention of either is expressed therein or it must be the mistake of one party and the fraud of the other in taking advantage of it and thus obtaining a contract with the knowledge that the party dealing with him is in error in regard to its terms. *Paine v. Jones*, 75 N. Y. 593.

## MONEY COLLECTED BY AN OFFICER.

**2050.** Money collected by an officer on legal process, while it remains in his hands is to be regarded as in *custodia legis*, and not the subject of levy or attachment in any form. Thus, an officer, who has collected money on an execution, cannot apply it in satisfaction of another execution, although the latter is against the party for whom the money was collected, and both executions are in the officer's hands for collection at the same time. *Hardy v. Tilton*, 68 Me. 195.

## MONEY HAD AND RECEIVED.

**2051.** To maintain an action for money had and received, it is necessary to establish that defendant has received moneys belonging to plaintiff, or to which he is entitled; it is not sufficient to show that defendant has, by fraud or wrong, caused the plaintiff to pay money to others, or to sustain loss or damage. *Nat. Tr. Co. v. Gleason*, 77 N. Y. 400.

**2052.** One G. who was a member of the board, defendant herein, as attorney for it received \$3,600.84 of its money, which he wrongfully appropriated to his own use; he subsequently procured from plaintiff on a forged mortgage \$4,129.34, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to the defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G. credit therefor; the check was paid and the money received thereon used by defendant. In an action to recover the amount so received by defendant from G., *held*, that defendant having received the money in good faith, and in the ordinary course of business, for a valuable consideration, was not liable. *Stephens v. Bd. Edn.*, 79 N. Y. 183.

## MORTGAGES.

**2053.** A. made a promissory note payable to the order of B., and executed to him a mortgage of land as security therefor, which was duly recorded. B. indorsed the note to C., and afterwards assigned the mortgage to D., and delivered to him another note similar in terms, and each paid a valuable consideration to B. *Held*, that C. was entitled in equity to an assignment of the mortgage from D. *Morris v. Bacon*, 123 Mass. 58.

**2054.** The mortgagee after condition broken, may, without notice, enter upon the mortgaged premises and take possession thereof, if he can do so peaceable and unresisted.

**2055.** About January 1, 1874, the plaintiff went away on a visit, and left his son, a lad, in care of the premises; that on January 3, the defendant went to the premises and enquired of the boy for the plain-



tiff, stepped upon the doorstep, and proclaimed that he took possession of the premises as owner, went quietly into the house, which was unfastened, the boy neither resisting nor consenting, removed the plaintiff's goods therefrom to an open shed, and left them there in the custody of the boy, and fastened up the house, and forbade the boy to enter. *Fuller v. Eddy*, 49 Rowell, Vt. 11.

**2056.** In a writ of entry brought by a mortgagee against the heirs of the mortgagor, to foreclose a mortgage of land, it is good defence that the mortgage was given without consideration; and parol evidence is admissible to show that no debt ever existed between the parties to the mortgage. *Hannan v. Hannan*, 123 Mass. 441.

**2057.** A mortgagee who makes an absolute assignment of a mortgage to her agent, can claim no relief as against a *bona fide* holder to whom the agent assigned it as security for his own debt. *Grocers' Bank v. Neet*, 29 N. J. 449.

**2058.** A mortgagee's power to sell only continues as long as the debt exists. When the debt is extinguished, the power to sell ceases, and an attempt to exercise it is, therefore, *ultra vires*, and transfers no title, unless the mortgagor so acts as to estop him from showing the facts. *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302.

**2059.** A bill of sale of a vessel, like a deed absolute on its face, may be shown by parol to be, in fact, a mortgage only, or a mere security for a debt. *National Ins. Co. v. Webster*, 83 Ill. 470.

**2060.** Where a party sells one of a series of notes, secured by mortgage on certain property, without warranty, and reserving to any holder of any other of said notes equal rights, it will not debar him from subsequently proceeding on another of said notes, and subjecting said property to the ratable satisfaction of each of said notes. *Howard v. Schmidt*, 29 La. 129.

**2061.** An equitable mortgage may arise from non-payment of purchase-money, a deposit of title deeds, or an unsuccessful attempt to make a valid mortgage deed. *Gale v. Morris*, 29 N. J. 222.

**2062.** Where a senior mortgagee forecloses his mortgages without making a junior mortgagee of the same premises a party to his action for the foreclosure, the rights of the junior mortgagee remain unaffected, and are not prejudiced by such foreclosure. *Stewart v. Johnson*, 30 Ohio, 24.

**2063.** Where one person advances money for another with which to purchase the title to land, taking the conveyance in his own name, as a security for the money so advanced, with interest, his deed will be treated as a mortgage, and on repayment he will be required to convey to the person for whom he so purchased. *Strong, et al. v. Shea, et al.*, 83 Ill. 575.

**2064.** The holder of a mortgage, given by a wife with her husband's authority, on her separate property, without the authorization of the judge under the Act of 1855, must prove that the debt which the mortgage was given to secure inured to the wife's separate benefit, before he can hold her liable. A wife separated in property is liable for her proportion of the household expenses, and for the whole of such expenses, if her husband is without means. *Mrs. Mary L. Hardin v. Wolf & Cerf*, 29 La. 333.

**2065.** An instrument of conveyance that on its face purports to

be given to secure a payment, is merely a mortgage. *Cowles v. Marble*, 37 Mich. 158.

**2066.** A sale by a mortgagee has the same effect as a sale by the mortgaging debtor. A mortgagee's sale relates back to the date of the mortgage, so far as to cut off redemption rights under titles or liens subsequent to the date of the mortgage, and to substitute for such redemption rights the pecuniary surplus from sale, which surplus is treated as the realty would have been. *De Wolf v. Murphy*, 11 R. I. 630; *Denton v. Naunty*, 8 Barb. S. C., N. Y. 618; also, *Mills v. Van Voorhis*, 23 Barb., 20 N. Y. 412.

**2067.** A grantee executed, at the same time and place, two mortgages on the same lands, one a purchase-money mortgage to his grantor, the other a mortgage to secure a bond given by himself and three sureties to W., for \$2,000, which were paid at the same time to the grantor. *Held*, that W. could not, by having his mortgage registered first, acquire a priority over the purchase-money mortgage; and that W.'s assignee held it subject to the same equity. *Brasted v. Sutton*, 29 N. J. 513.

**2068.** Besides a mortgage on lands, a chattel mortgage, covering the fixtures thereon, was executed at the same time and to secure the same debt, consisting of several bonds. *Held*, that one bondholder could not, by obtaining a judgment on his bond and levying on such fixtures, acquire a preference over the other bondholders, even if those fixtures were not a part of the realty, and the chattel mortgage had not been refiled within the time required. *Fish v. New York Water Proof Paper Co.*, 29 N. J. 16.

**2069.** A lien or mortgage, securing a negotiable note, passes as an incident to the note, to the assignee or indorser, free from the equities between the original parties. *Duncan v. Louisville, etc.*, 13 Bush, Ky. 378.

**2070.** A mortgage given to secure future advances or indorsements is valid; it is a conveyance within the recording acts, and so, may be recorded. *Ackerman v. Hunsicker*, 85 N. Y. 43.

**2071.** A mortgage, duly recorded, given to secure future indorsements or advances, has a preference over subsequent judgments against the mortgagor, as well as to indorsements or advances made upon the faith thereof subsequent to the rendition of the judgments, without notice thereof as to those previously made; and this without regard to the question whether the indorsements or advances were optional or obligatory. *Ackerman v. Hunsicker*, 85 N. Y. 43.

**2072.** Possession of real estate by a mortgagee, acquired by force or fraud, against the will and consent of the owner, and without color of lawful authority, is not a defence to an action of ejectment brought by such owner. *Howell v. Leavitt*, 95 N. Y. 617.

**2073.** A personal obligation on the part of a grantee to pay a mortgage upon the premises conveyed may not be implied from a statement in his deed that the conveyance is subject to the mortgage, and that the amount thereof "forms part of the consideration, and is deducted therefrom." *Eg. L. As. Soc. v. Bostwick*, 100 N. Y. 628.

**2074.** A conveyance to a trustee, absolute on face, but with instrument of defeasance, showing an intent simply to secure a debt, is a mortgage. *Leal v. Walker*, 111 U. S. 242.



**2075.** A mortgage will not be held void by reason of vagueness or uncertainty in the description of the mortgaged premises, if by any particulars in the description they can be ascertained so as to enable the court to say that the words used were intended to relate to them. *People, et al. v. Storms*, 97 N. Y. 364.

**2076.** Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the purchase-price the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgaged debt, and the remainder is liable as security merely. *Wilcox v. Campbell*, 106 N. Y. 325.

**2077.** The purchaser, therefor, is bound to protect the mortgagor and his land from any liability on account of the mortgaged debt. *Ibid.*

**2078.** This obligation on the part of the purchaser is not affected by its conveyance, and if the said purchaser fails to protect the residue from sale under the mortgage, he becomes liable to the grantee thereof for the damages thus caused him. *Ibid.*

**2079.** The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and if he fails so to do and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages. *Ibid.*

**2080.** An assumption of a mortgage contained in a deed and to a married woman, without her knowledge or consent, and never delivered to her, does not bind her. *Culver v. Badger*, 29 N. J. 74.

**2081.** A. executed a deed or mortgage of land containing the condition "that if, on demand, there shall be paid" \$1,000 on a certain promissory note, signed by A. as indorser, then the deed shall be void. The note was signed by A.'s son, as principal, and was for more than \$1,000, and was given on account of a defalcation of his, and upon the giving of which the son was taken back into the promisee's employ, upon an agreement that a part of his wages should be applied in payment of the debt; under which arrangement more than \$1,000 was received by the promisee, out of the son's wages, leaving more than \$1,000 due on the note. *Held*, on a bill in equity by A. to redeem the mortgage, that the amount received from the son's wages was not to be credited to the mortgage. *Popple v. Day*, 84 Ill. 520.

**2082.** An assignee of a mortgage takes it subject to all defences existing against the mortgagee in favor of the mortgagor, but free from latent equities existing in favor of third persons. *De Witt v. Van Sickle*, 29 N. J. 209.

**2083.** The grantee of a mortgagor of land cannot, because of fraud practiced by the mortgagee upon the mortgagor in obtaining the mortgage, maintain a bill in equity against an assignee of the mortgagee to restrain a sale of the mortgaged premises under a power in the mortgage, without paying the entire debt secured by the mortgage, although the mortgage was assigned to the defendant as security for a less amount. *Foster v. Wightman*, 123 Mass. 100.

**2084.** An assignment, duly recorded, by the holder of a mortgage containing a power of attorney of sale, and made to secure two notes for \$1,000 and \$2,000, of "the said mortgage deed, the real estate

thereby conveyed, so far as the same is security for said note of \$1,000, thereby secured," transfers the mortgage as security in the first place, for the payment of the whole of the note of \$1,000, although the assignment contains no covenant of warranty. *Foley v. Rose*, 123 Mass. 557.

**2085.** If one who holds, by an assignment duly recorded, a mortgage and a note indorsed in blank, purporting on its face to be secured by it, "the same being collateral to" a certain note, assigns the mortgage, and afterward indorses the note for which it was collateral, retaining the mortgage note, to another, by an assignment in like words duly recorded, he conveys a title to the mortgage debt, except as against an innocent purchaser for value without notice; and one, to whom he subsequently passes the mortgage note and fraudulently assigns the mortgage upon a separate paper as collateral security for a loan, is not such a purchaser. *Strong v. Jackson*, 123 Mass. 60.

**2086.** If a third mortgagee of land, which is subject also to a fourth mortgage, sells, under power of sale contained in his mortgage, the entire title in the land, with the assent of the prior mortgagees, for a sum sufficient to pay off all the four mortgages, the fourth mortgagee can maintain an action against him for money had and received. *Cook v. Basley*, 123 Mass. 396.

**2087.** A., for the purpose of enabling B. to raise money for him, made a promissory note payable to the order of B., and executed to him a mortgage of land, as security therefor, which was duly recorded. B., without A.'s knowledge or consent, and to secure his own debt, delivered the note unindorsed to C., and afterwards assigned the mortgage and a note, procured from A. by artifice, to D. for value. Held, that C. was not, in the absence of fraud on the part of D., entitled in equity to an assignment of the mortgage. *Blunt v. Norris*, 123 Mass. 55.

**2088.** A *bona fide* assignee of a mortgage is entitled to hold it as against the original owner, who, by placing it in her agent's hands assigned in blank or for a particular purpose, gave him the opportunity to perpetrate a fraud upon her. *Putnam v. Clark*, 29 N. J. 412.

**2089.** The unauthorized cancellation of a mortgage by the recorder of mortgages cannot impair any rights of the owner of the mortgage. *Mechanics' Building Association v. Ferguson*, 29 La. 548.

**2090.** A lessee of land became the owner of an undivided portion of it, and executed a mortgage of this undivided portion, reciting that a part of the premises was subject to a lease, and that the leased premises were included in the description and in the mortgage. The mortgagee afterward entered to foreclose. Held, that, even if the lease passed by the mortgage, the lessee had the right of possession against all persons except the mortgagee, until the expiration of three years from the entry, and could maintain an action of tort, for a trespass within that time, against a third person. *Martin v. Tobin*, 123 Mass. 85.

**2091.** The mere fact that a mortgagee withholds a mortgage from record does not necessarily invalidate the mortgage as against creditors; it may have effect against him after it is recorded, unless it is impeached for fraud, and in determining that question such withholding from record must be considered. *Black v. Ruhlman*, 40 Ohio, 196.



**2092.** Where a note and mortgage are once barred, a subsequent revivor of the note by a part payment, promise, or acknowledgment of the payer, will revive the mortgage so far as it affects the interests of the payor in the mortgaged premises. But such revivor of the note will not revive the mortgage as against a grantee in the mortgaged premises prior to the revivor of the note. In case of a note and mortgage, the latter being merely an incident to and security for the former, the mortgage is not barred until the note is. *Schmucker, et al. v. Sibert, Assignee*, 18 Kansas, 104.

**2093.** Whatever will validate a mortgage between the parties will validate it as to third parties with notice. Actual notice is as effectual as the constructive notice of record. *McAdow v. Block*, 4 Mont. 475.

**2094.** M., one of the defendants, entered into a contract with H. in the summer of 1872 to the effect that H. would furnish him with building materials, and M. would pay H. therefore at the market rates, a portion by mortgage and a balance in cash. H. furnished the materials as they were required by M., and at various times in August and September M. gave H. four promissory notes for \$1,000 each. Three of the notes were indorsed by H. and delivered to the Manufacturers' and Builders' Bank, which discounted the same for him. The fourth note was also indorsed by H. and offered by him to the Eleventh Ward Bank for discount, and was by it refused, and they never paid any sum to him on the credit thereof; but when applied to by H. said bank refused to surrender the note, but claimed to hold the same for a general balance of account owing by him to the bank, arising on previous dealings with him. On September 25, 1872, M. and wife executed and delivered to H. the bond and mortgage in question to secure the sum of \$7,000, which was justly owing to H. for materials furnished, and in final settlement of the amount for such materials a credit was given by him on account of said mortgage for the full face thereof. H. promised to pay the three notes discounted for him by the Manufacturers' and Builders' Bank out of the proceeds derived from the sale of the mortgages, and also to procure and surrender to M. the note offered to the Eleventh Ward Bank for discount, but he was prevented from performing this promise by the bank's refusing to surrender the same. It was not intended or agreed at the time the bond and mortgage was delivered to H. that it was to be assigned to the Manufacturers' and Builders' Bank as security for the notes held by them or for any other purpose, and the only agreement relating to said notes was as above stated. H. assigned the bond and mortgage to Daniel P. Ingraham, Jr., who assigned the same to Edward B. Stead (both assignments being for a valuable consideration), who afterwards duly assigned the same to plaintiff, who paid therefor the sum of \$6,700. The plaintiff had no notice or knowledge of any claim or equity against said bond and mortgage, and as an inducement to purchase the same there was shown and delivered to him a certificate of both of the mortgagors, asserting said bond and mortgage to be valid and free from all defences and equities. In action to foreclose the mortgage, *Held*, that the bank had no right upon declining a discount to retain the note, and its action was clearly tortious. The bankers' lien does not extend to such paper.

**2095.** *Held, further*, that even if the right to hold the note were

established, the banker had no possible equity in the mortgage. Such an equity could attach, if at all, only in favor of one who had actually negotiated the note or parted with the value upon the strength of the security.

**2096.** Although, as to the receiver there is, perhaps, a case of a latent equity arising out of an implied trust, such an equity is not to be preferred to that of a *bona fide assignee* for value received. Equity will not aid a *cestui que trust* against a *bona fide* purchaser (from a trustee) without notice of the trust. Where the mortgage was ultimately given to H. without reserve and with a mere understanding as to the application of the proceeds, no equity is raised in the security, certainly not as against the plaintiff, who has paid full value, and who could not, by any proper enquiry, have learned of the latent equity. *Petrie v. Myers, et. al.*, 54 Howard, N. Y. 513.

**2097.** The plaintiff, being embarrassed, upon defendant's advice conveyed to him real estate, on defendant's parol promise that he would obtain from a building association, on the security of the real estate, a loan, with which he would pay plaintiff's liabilities, repay the loan from the rents, and reconvey to plaintiff when the loan should be repaid. Held, that the transaction was a mortgage. The purpose not being to sell, but convey as security, it is immaterial that defendant was to procure the money at a future time and from a third person. The defendant received the deed without consideration, except his promise to raise the money for plaintiff; if it was not intended to be raised it would be a fraud, and the defendant a trustee *ex maleficio*. The plaintiff's bill charged that defendant held in trust for him; did not allege that he was mortgagee, and prayed for account and reconveyance; it was dismissed below on the ground that there was no trust. The facts set out showing it to be a mortgage, the Supreme Court sustained the bill, to reach the justice of the case, disregarding the use in the bill of inappropriate terms. *Danzeisen's Appeal*, 73 Penn. 65; *Bernet v. Dougherty*, 8 Casey, 371; *Sweetzer's Appeal*, 21 P. F. Smith, N. Y. 264.

**2098.** In August, 1872, F. and H. executed a joint note to G., payable in one year. On the face of the note each appeared as principal. The note was, in fact, given for borrowed money, and the money was borrowed for F., and received and used by him. To secure this note H. gave a mortgage on certain real estate, which mortgage was duly recorded. In September, 1873, F. handed to H. the amount of the loan, and took from him a receipt therefor, in which the latter promised to pay the note, but instead of then paying it, he obtained an extension of a year, by the payment of advance interest and a bonus. In January, 1874, H. borrowed money of S., and gave a note secured by a mortgage on the same and other property. In September, 1874, F. paid to G. the amount then due on the note, and took an assignment without recourse. Held, that at the first E. was to be regarded as the principal debtor, and that a payment by him to the payee of the note, prior to September, 1873, would have discharged both note and mortgage absolutely; but that by the payment in September, 1873, from F. to H., the promise of the latter to pay the note, and the obtaining of a year's extension of the time of payment, H. became in equity the principal debtor; and that as all this took place before the note



and mortgage to S., the latter's rights were in no way prejudiced; and that F. by his subsequent payment to G., and the assignment of the note, was entitled to hold that note and mortgage as a valid and prior lien upon the mortgaged premises. *Field v. Sherrill*, 18 Kansas, 365.

**2099.** A third person cannot be affected by any notice of a mortgage, except the notice conveyed to him by the inscription of the mortgage. All are third persons, except the parties. The inscription of a mortgage, after the lapse of ten years from the date of inscription, unless reinscribed, is utterly void as to third persons, and is no longer any proof of the mortgage, even between the parties to it. *Adams & Co. v. Daunis*, 29 La. 315.

**2100.** Purchasers of non-negotiable demands from others than original owner of them can take only such rights as he has parted with except when by his acts he is estopped from asserting his original claim. He must in such cases, as Lord Thurlow said, "Abide by the case of the person from whom he buys." *Cuts v. Guild*, 57 N. Y. 229; *Ingraham v. Disborough*, 47 N. Y. 421; *Bush v. Lathrop*, 22 N. Y. 535; *Cowdrey v. Vandenburg*, 101 U. S. 575.

**2101.** The rule that one who has purchased and received a conveyance of a portion of mortgaged premises may require that all of the balance shall first be sold to satisfy the mortgage, before resort shall be had to his portion, applies, although part of the residue is situated in another State. *Welling v. Ryerson*, 94 N. Y. 98.

**2102.** The assignee of a mortgage is not affected by a collateral agreement between the mortgagor and mortgagee, made at the time of the execution of the mortgage, of which he had no notice, and in a suit upon the mortgage by the assignee said agreement cannot be set up as a defence. *McMasters v. Willhelm*, 85 Penn. St. 218.

**2103.** When a party, who was indebted to another, executed a conveyance to secure the indebtedness, and received from the grantee an instrument, binding him to reconvey upon payment of the debt; *held*, that the transaction constituted a mortgage, and that it was not competent for the grantor to insist upon a foreclosure thereof, but that he must pay the amount due before he could ask the cancellation of the conveyance. *White v. Lucas*, 46 Iowa, 319.

**2104.** A purchaser from a mortgagor may recover the land mortgaged, in trespass to try title, against parties holding under a foreclosure sale, to which the plaintiff was not a party. Such foreclosure proceedings do not affect the right of a purchaser from a mortgagor prior to the suit for foreclosure, and not made a party to such suit. *Morrow v. Morgan*, 48 Texas, 304.

**2105.** In an action to recover upon certain promissory notes, and to foreclose a real estate mortgage given to secure the payment of the notes, where the judgment required the defendant to pay the debt and costs within one day after its rendition and on default thereof, the clerk is directed to issue a special execution to sell the real estate to satisfy the judgment; *held*, not erroneous because no more time is allowed. The debtor to raise and pay the money prior to the issuance of the special execution. *Blandins, Adm'r v. Wade*, 20 Kansas, 251.

**2106.** The clause in a mortgage, fixing the fees of the creditor's

attorney of five per cent. in the event of the non-payment of the debt at its maturity, makes the debtor, on the happening of the event, absolutely liable for that amount; and this liability cannot be affected by the fact the creditor has not really paid, or obligated himself to pay, that amount of attorney's fees. *Renshaw v. Richards*, 30 La. 398.

**2107.** A man may make a valid mortgage for the payment of money, without particularly describing the writing which may be evidence of the debt, or without even giving any independent written evidence thereof. But he is not at liberty to substitute a different condition, by parol evidence, for that which he expressed in his deed. A man may mortgage to an agent in order to procure credit from his principal, and the agent may enforce the mortgage as the trustee of his principal. *Varney v. Hawes*, 68 Me. 442.

**2108.** When a mortgagee has, upon demand, rendered a true account of the amount due upon the mortgage, a bill in equity to redeem cannot be maintained, unless the plaintiff first tender to the mortgagee the amount due, or is prevented from so doing through the fault of the mortgagee. *Dinsmore v. Savage*, 68 Me. 191.

**2109.** The same rule as to the necessity of registration, in order to give a priority of title, prevails between different assignees of a mortgage as between grantees under ordinary deeds. A mortgagee assigned the mortgage thus: "I hereby assign to the said (assignee) the within mortgage deed, the debt thereby secured, and all my right, title and interest in the premises therein described." *Held*, that this assignment, having been recorded, transfers the mortgage title as against a prior unrecorded deed of the same land by the mortgagee, unless it is shown that the assignee had actual notice of the prior deed. *Wiley v. Williamson*, 68 Me. 71.

**2110.** A mortgagee of real estate, before foreclosure of his lien, even when the mortgagor is insolvent, and the mortgaged premises insufficient to pay the mortgage debt, cannot maintain an action against one who has removed an engine and boiler from the mortgaged premises, and sold them, to recover the value of the property so taken and converted. *Alexander v. Shonyo*, 20 Kansas, 705.

**2111.** R. mortgaged to S. certain land, on which was a grist mill, and in which mill were certain fixtures. Afterwards R., for the purpose of defrauding S., severed said mill fixtures from the mill, and sold and delivered them to K., who purchased and received the same for a like purpose. *Held*, that said mill fixtures belonged to R. until he sold them to K., and that they never became the property of S., and that neither S., nor any person claiming under him, can maintain replevin against K. for them. *Vanderslice v. Knapp*, 20 Kansas, 647.

**2112.** A mortgage of land to "Pinson, Dillard & Co." is not void for uncertainty, in not giving the surnames of some of the members of the firm, and in omitting the christian names of all of them. And even if the title only vested, by the conveyance, in those whose surnames were mentioned, the mortgage would enure to the benefit of all of the members of the firm, and they might all join in the suit to enforce it. A mortgage given for preëxisting debt is not invalid for want of valuable consideration, as against a prior unrecorded mortgage, where the time of payment of the debt is extended by a note,



taken four days before the execution of the mortgage, formed one transaction. *Schumpert v. Dillard, Pinson & Co.*, 55 Miss. 348.

**2113.** When a mortgagor conveys real estate, and the conveyance contains a statement that the grantor will assume and pay the note which the mortgage is given to secure, and the grantee accepts the same, and enters into possession of the premises, he becomes directly and personally liable to the holder of the note and mortgage for the amount due. *Fitzgerald v. Barker*, 4 Mo. Court of Appeals (St. Louis) 105.

**2114.** Omitting to name the State, county, and township, in the description of premises in a mortgage, will not invalidate the instrument, where other adequate elements of identification exist; and it is not essential that the property should be so described as to identify it without the aid of extrinsic proofs, but it is always competent to connect the written description with the material subject matter by proof of the surrounding circumstances. Where there are descriptive signs satisfactorily ascertained which designate the thing meant to be granted, the addition of circumstances or accompaniments which are untrue, will not defeat the grant, but they will be rejected. *Slater v. Breeze*, 36 Mich. 77.

**2115.** A bill in equity alleged that A. purchased an estate with the plaintiff's money, and had it conveyed to his wife, who took it, with notice of the same; that A. and his wife mortgaged the estate to B., who assigned the mortgage to C., both of whom had notice of the resulting trust to the plaintiff. A decree was made that C. assign the mortgage to the plaintiff. *Held*, that an assignment was unnecessary, and would impair the rights of the defendants among themselves; and that the mortgage should be discharged by a deed of release to the plaintiff, or by an entry upon the margin of the record of the mortgage in the registry of deeds. *Harwood v. Pearson*, 122 Mass. 425.

**2116.** The unauthorized cancellation of record of a mortgage by the clerk, or register, without the knowledge or consent of the mortgagee, will not affect the rights of the latter under the mortgage, even as against a *bona fide* purchaser of the mortgaged premises, with notice of the mortgage, though he has no notice that the cancellation was unauthorized, and presumed, from the certificate of cancellation, that the lien of the mortgage was extinguished. A mortgage may be assigned by delivery merely. *Harris v. Cook*, 28 N. J. Eq. 345.

**2117.** The holder of two mortgages on the same parcel of land entered to foreclose the first mortgage, but did not enter under the second mortgage. A bill in equity was brought against him to redeem the first mortgage, and in his answer he did not set up the second mortgage. A decree was entered that, on payment of a certain sum, he should release and discharge the mortgaged premises, described in the bill, from the mortgage therein described, and should deliver up possession of the premises. *Held*, on a subsequent bill in equity to obtain the discharge of the second mortgage, that he was not estopped to set up the second mortgage. *Gerrish v. Black*, 122 Mass. 76.

**2118.** Mortgage having been made to secure several negotiable notes, and the notes having been passed to several different holders, and one of the holders having obtained a general judgment, and another having foreclosed the mortgage in the name of the mortgagee for his

use, a sale of the premises under the general judgment passed the title free from the mortgage lien, the attorney representing the judgment of foreclosure having placed the execution founded thereon in the hands of the officer of the law making the sale, and caused the title, unincumbered, to be sold, and there being no fraud in the sale, and the premises having brought full value, or an amount approximating thereto. The notes not covered by either judgment cannot be enforced against the land, but are thrown, in equity, upon the fund produced by the sale, for their *pro rata* share thereof. *Smith, et al. v. Bowne, et al.*, 60 Ga. 484.

**2119.** Under the Code (§ 1955) a mortgage must clearly indicate the creation of a lien, and specify the debt to secure which it is given. A deed in fee simple, without condition or defeasance, and a bond for titles from the grantee to the grantor, in which bond the grantee obligates himself to convey the premises to the grantor on the payment of a sum of money, do not separately or together indicate the creation of a mere lien; but the purpose indicated is to divert the grantor of title, and to vest title in the grantee until the payment of the debt. To take a bond for a future conveyance, and then deny that the maker thereof had any estate in the premises at the time he gave the bond, no fraud or mistake being alleged, is idle and inconsistent. If a judgment creditor, whose judgment is junior to an absolute deed made to secure another creditor, can subject the land without redeeming, or offering to redeem, it is because the Registry laws have not been complied with, or else because the debtor having retained possession, the conveyance is to be deemed fraudulent. *Gibson v. Hough & Sons*, 60 Ga. 588.

**2120.** A bill of sale whereby a debtor conveys personal property to his creditor as *security*, and which provides that the property shall remain in the debtor's possession, and he have thirty days to redeem by paying the debt, is a mortgage. *Blodgett v. Blodgett*, 48 Vt. 32.

**2121.** A mortgagor of personal property, after condition broken, has an equity of redemption that may be asserted if he brings his bill to redeem within a reasonable time. *Ibid.*

**2122.** A tender of the amount of the debt after the law day has passed, unaccepted, does not divert the mortgagee of his legal right to the property mortgaged; and Chancery has jurisdiction to decree redemption. *Ibid.*

**2123.** When the mortgagee disposes of the property, after tender made, and before final hearing, that an order for its delivery cannot be made, a decree may be entered for the amount of the mortgagor's interest therein. *Ibid.*

**2124.** While it is not lawful for banking associations, established under the U. S. St. of 1864, c. 105, to purchase, hold and convey real estate, except in certain specified cases, among these exceptions are included such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted; such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; such as it shall purchase at sales under judgments, decrees, or mortgages held by such associations, or shall purchase to secure debts due to said association." Under the latter clause, it cannot be deemed that the only authority given to such associations is to pur-



chase only to the exact amount of the debts which may be owing to them, but they are entitled to purchase such real estate as may be necessary in order to secure the debts due to them, so long as the security of such debts is the real object of the purchase. By oral evidence it was proved that a bankrupt applied to the defendant for a loan of a certain sum to enable him, together with his own funds, to take up the mortgage; that the defendant lent him the sum requested (\$3,000), upon his verbal promise to assign the mortgage to him to secure the sum lent and certain notes then due (\$911) to the defendant by the bankrupt. The claim that this was a loan of money upon real estate security, or a purchase of real estate, is not maintained, when it is found, as a fact, that the inducement to this transaction was the agreement that the mortgage, and the real estate upon which it was secured, should be held for the antecedent debt due the bank. By the assignment in bankruptcy the assignee has succeeded to all the rights of the assignor, Emerson; but his rights here are not superior to those of Emerson. He has come into a Court of Equity to seek its aid in obtaining those rights, and is, therefore, to do what Emerson would have been compelled to do. In order to obtain a decree for the redemption of the mortgage, he must perform the oral agreement that the debt of \$911, due the bank, should be paid, as pay the balance of the \$3,000, which is now due. *Upton, Assignee, v. National Bank of South Reading*, 120 Mass. 153.

**2125.** A. executed a mortgage of real estate, with a power of sale, to B., and subsequently conveyed the equity of redemption to C. The mortgage provided that after the expiration of sixty days from the breach of any of the conditions named therein, the mortgagee, or those claiming under him, might sell the premises at public auction, "without further notice or demand, except giving notice" by advertisement for three successive weeks in a newspaper. Upon breach of condition for non-payment of interest, all the notices by advertisement were duly given, but did not state for what breach of condition the sale was made, and the sale took place as advertised. Before the sale, B. caused to be sent to A., by mail, a copy of the paper containing the advertisement, and A. knew that the interest on the mortgage was in arrears, was informed that it must be paid, and asked where C. was. No formal demand was made upon A. It appeared that A. knew from some source that there was to be a sale of the property, or some interest therein, and, without making proper inquiry, carelessly, but honestly, assumed and believed that it was not to be a sale under the power contained in the mortgage made by him. A. made no effort to ascertain the facts, and did not attend the sale, at which the property was sold for less than its value. After the sale, A. offered to redeem the mortgage, and demanded an assignment thereof; was refused, and brought a bill in equity against B. and the purchaser, to redeem. *Held*, that the notices were not required to state for what breach of condition the sale was made; that mere inadequacy of price was not sufficient to invalidate the sale; and that A. could not maintain his bill. *King v. Bronson*, 122 Mass. 122.

**2126.** A mortgagor of personal property has no such interest therein as can be levied upon and sold, and no lien can be obtained by the process of such levy. *Gordon v. Hardin*, 33 Iowa, 550, and *Van*

*Slycke v. Mills*, 34 Iowa, 375, followed in *McConnell v. Denham*, 72 Iowa, 494.

**2127.** A tender of the amount due upon a mortgage after condition broken does not discharge the mortgage. A mortgagor cannot maintain a writ of entry against a mortgagee in possession. *Rowell v. Mitchell*, 68 Me. 21.

**2128.** A mortgagor of real estate, or the owner of the equity of redemption, has to the day of sale to make payment and release the mortgaged premises from the lien and sale, and the provisions of law require printed notice of the time and place of sale to be given for at least thirty days before any sale can be had. *Blandins, Adm'r v. Wade*, 20 Kansas, 253.

**2129.** A mortgage is not invalidated by a misdescription made by a scrivener, where the premises may be identified by the admission of the parties themselves, by reference thereto in other deeds, and by an actual location thereof by the parties. *Boon v. Pierpont*, 28 N. J. Eq. 6.

**2130.** The deed of a married woman is not complete, so as to convey title to land, without the certificate of privy acknowledgment prescribed by the statute; and its absence cannot be supplied by parol evidence. *Looney v. Adamson*, 48 Texas, 619.

**2131.** A mortgage containing a clause that the mortgagor shall have possession, without paying rent, of the mortgaged property until a fixed date, is not to be construed thereby to confer the right of possession thereafter to the mortgagee. *Morrow v. Morgan*, 48 Texas, 304.

**2132.** A mortgage, primarily without any consideration, given to secure certain negotiable notes in the hands of any future holder, becomes a valid mortgage in favor of any innocent third person, who may acquire one of the notes before its maturity, and for value. *Billgery v. Ferguson*, 30 La. 84.

**2133.** A mortgagee who transfers part of the mortgage debt to another, cannot compete with his transferee for the proceeds of the mortgaged property, where the amount is not sufficient to satisfy both. *Baskdull v. Herwig & Smith*, 30 La. 618.

**2134.** An assignee of a mortgage, given to secure the payment of a negotiable note, is held entitled to the same protection that he would have as assignee of the note without the mortgage. *Dutton v. Ives*, 5 Mich. 515; also, *Helmer v. Krolick*, 36 Mich. 371.

**2135.** A stipulation in a mortgage for the payment of reasonable attorney's fees, in case suit is commenced thereon is valid, and may be enforced in any action for the foreclosure of the mortgage. *Danforth v. Charles, et al.*, 1 Bennett's Dakota Rpts. 285.

**2136.** A mortgage is binding between the parties to it, whether acknowledged or not. *Lemay v. Williams*, 32 Ark. 166.

**2137.** The registry of a judgment against a party will operate as a legal mortgage on all the immovables of that party situate within the parish wherein the judgment is registered, whether the deed to such immovables is recorded or not, and such mortgage is good against everybody that the judgment debtor's title to the immovables is good against. *Logan v. Hebert*, 30 La. 727.

**2138.** A mortgage, executed by a tenant in common, of an undi-



vided interest in a specified parcel of land is invalid as against his cotenants. *Marks v. Sewall*, 120 Mass. 174.

**2139.** Mortgage given to secure the payment of a preëxisting debt, the mortgagee cannot claim protection against older equities as a *bona fide* purchaser for a valuable consideration. *Alexander v. Caldwell*, 55 Ala. 517.

**2140.** The statute grants no power to an administrator to borrow money upon a mortgage of the real estate of the decedent. Such an act is foreign to the policy and purposes of administration, which aims to close up, not to continue an estate. Such mortgage is without legal authority, and void; and in the absence of fraud, misrepresentation, or mistake, the heirs are not estopped to plead its invalidity by reason of the benefit resulting to them by means of the mortgage. *Black v. Dressell's Heirs*, 20 Kansas, 153.

**2141.** Where a mortgagee of chattels, in the absence of an agreement in the mortgage, purchases the property at a mortgage sale, and appropriates it to his own use, he becomes liable for the actual value thereof at the time of the sale, without reference to the amount bid. *Webber v. Emmerson*, 3 Colo. 248.

**2142.** A mortgagor of real estate has the right to the possession of the mortgaged property, and to sever and remove timber, wood, sand, earth, coal, stone, or anything else, therefrom, and to sell the same, unless it unreasonably impairs the mortgage security. When it impairs the mortgage security, the remedy of the mortgagee is not at law, but in equity; not replevin to recover the property severed from the realty, but generally injunction, to restrain the commission of waste upon the realty. *Vanderslice v. Knapp*, 20 Kansas, 647.

**2143.** An unrecorded mortgage valid as against heirs of mortgagor. A *scire facias* will lie on an unrecorded mortgage. *A. P. Laughlin v. Ihmsen*, 85 Penn. St. 364.

**2144.** Where the superintendent of the insurance department has accepted from an insurance company an assignment of a mortgage as a part of the deposit to be made with him, under the requirements of the insurance law, on the faith of a representation on the part of the mortgagor that there is no legal or equitable defence to the same, he can avail himself of the doctrine of estoppel prohibiting a debtor, upon the faith of whose statements an assignment of his obligation has been accepted, from disputing such statements. *Smyth v. Munroe*, 84 N. Y. 351.

**2145.** When assignment of mortgage is accepted upon faith of statement by mortgagor that there is no legal or equitable defence, he and those deriving title under him estopped from proving agreement between him and mortgagee for release of portion of mortgaged premises. *Smyth v. K. L. Ins. Co.*, 84 N. Y. 589.

**2146.** In a suit in equity for redeeming unoccupied and uninclosed city lots from a mortgage, the mortgagee in constructive possession is chargeable only with the amount actually received by him for use and occupation. *Peugh v. Davis*, 113 U. S. 542.

**2147.** Defendant D. executed to plaintiff an assignment under seal of a bond and mortgage, which contained a guaranty of payment of the amount secured in case of the failure of the mortgagors to pay. In an action to foreclose the mortgage, D. was sought to be charged

with any deficiency. He alleged and offered to prove that at the time of the execution of the assignment, plaintiff, in consideration of being permitted to retain \$300 out of the purchase-money and of the assignment to him of a policy of insurance upon a building on the premises, agreed by parol to keep the building insured until the mortgage became due, that she did not do this, and that the building was destroyed by fire. The evidence was objected to and excluded. *Held*, error; also, that the fact that the breach of this parol agreement was not in terms set up as a counterclaim was not available here, as the facts were alleged, and no objection to the proof offered was made upon the ground that the pleading was defective. *Van Brunt v. Day*, 81 N. Y. 251.

**2148.** To entitle a mortgagor to maintain an action to extinguish the lien of his mortgage because of a tender of the amount due and a refusal to accept, the tender must be kept good. *Tuthill v. Morris*, 81 N. Y. 95.

**2149.** The rule that a party coming into a court of equity for affirmative relief must himself do equity, requires, in such case, that the mortgagor pay the debt secured by the mortgage, with costs, in any foreclosure proceedings, and the interest at least up to the time of the tender. *Tuthill v. Morris*, 81 N. Y. 95.

**2150.** The most that can equitably be claimed by the mortgagor is relief from the payment of interest and costs, subsequent to the tender, to entitle him to this he must keep the tender good from the time it was made. *Tuthill v. Morris*, 81 N. Y. 95.

**2151.** Mortgage when held as security for the payment of negotiable paper, to defence to which the notes in their hands would not equally be open. *Carpenter v. Longan*, 16 Wall. U. S. 271.

**2152.** Defendant and one O'D. entered into a contract for the purchase by the former, and sale by the latter, of certain premises. Defendant agreed to pay a portion of the purchase-price by the assignment of a mortgage which he covenanted should be a valid and subsisting first lien; the property covered by it to be of the value of \$4,000. O'D. conveyed the premises and defendant assigned the mortgage; the assignment contained a guaranty that the mortgage was a valid and subsisting lien, but contained no covenant as to the value of the mortgaged premises or as to the priority of the lien. *Held*, that the acceptance of the assignment was not a satisfaction or extinguishment of the covenant as to value in the agreement; and that an action was maintainable for a breach thereof. *Smith v. Holbrook*, 82 N. Y. 562.

**2153.** In an action against an assignor of a note and mortgage given to secure its payment upon a covenant as to value of the mortgage, *held*, that the covenant having been given to indemnify against loss on the mortgage; defendant was entitled to have the value of the note allowed in diminution of damages; but that its value at the time of the trial could only be considered, not the value at the time of the assignment; and, as it was admitted on the trial that the makers of the note had become insolvent and had been adjudicated bankrupts, that a charge of the court as follows was proper, to wit: "that it was unimportant as to whether the makers were or were not solvent at the time of the assignment but that the only inquiry on the question of damages was whether the mortgaged property was at that time worth



less, and how much less than \$4,000." *Smith v. Holbrook*, 82 N. Y. 562.

**2154.** Where mortgaged property is sold under a power, the absence of objection on the part of the mortgagor to the sale as made cures any defect which exists therein, and gives it validity. *Markley, et al. v. Langley, et al.*, 92 U. S. 142.

**2155.** Where the mortgagees are expressly authorized to sell for cash or on credit, they may do either, or combine them in the sale; nor is a sale for part in cash and part on credit under a power requiring it to be made for cash invalid, if the departure from the terms of the power is beneficial to the mortgagor. It is immaterial whether such arrangement for payment is made before or after the sale. *Ibid.*

**2156.** To redeem property which has been sold under a mortgage, as is alleged, irregularly, the whole mortgage-money must be tendered, or if suit be brought, be paid into court. *Collins v. Riggs*, 14 Wall. U. S. 491.

**2157.** Mortgage when held as security for the payment of negotiable paper is open as against *bona fide* holders of the paper for valid, defence to which the notes in their hands would not equally be open. *Carpenter v. Longon*, 16 Wallace, 271; also, *Kenicott v. The Supervisors*, 16 Wall. 452.

**2158.** A mortgage on real estate is only personal property, and under the Revenue Laws of Montana (Codified Laws of 1871-2), can only be assessed in the county where found. The record of such mortgage in the recorder's office of a county, being only a copy of the original, is not taxable personal property. *Gallatin County v. Beattie*, 3 Montana, 173; cited *Mack v. Wetzlar*, 39 Cal. 217; also, 4 *Kent's Com.* 174.

**2159.** Although an instrument which purports to mortgage a crop the seed of which has not yet been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged has been sown and the crop grows, a lien attaches. *Butt v. Ellett*, 19 Wallace, U. S. 544.

**2160.** A mortgage was executed to M. and S., who were copartners, doing business under the firm name of M. & Co. It was expressed in the condition of the mortgage that it was intended among other things, "as a continuing security and indemnity" to the mortgagees "for and against all liabilities they then had incurred or might thereafter incur as indorsers, acceptors or sureties in any form" for J. B., one of the mortgagors, or the firm of J. B. & Co. Held, that the mortgage included not merely such liabilities as were incurred by the mortgagees jointly as copartners; but such as were incurred by either of them, separately and individually. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2161.** After the delivery of the mortgage M. died; by the articles of copartnership it was stipulated that in case of the death of one of the partners, the survivor should continue to carry on the business for the benefit of both parties, for a time specified after such death. Held, that the authority thus conferred, if valid and operative (as to which *quoere*), did not authorize the survivor to bind the estate of the deceased by new accommodation indorsements, nor did it permit and make valid an indorsement of the firm executed by the survivor as a

renewal of an indorsement made in the lifetime of the deceased and with his assent. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2162.** At the time of the death of M. plaintiff held the paper of J. B. & Co., indorsed by M. & Co. to a large amount. Upon the request of B. & Co. and with the concurrence of S. and the assent of the executors of M., an arrangement was made to the effect that the mortgage should be assigned to plaintiff, that the paper held by the latter should be protested at maturity, and as each note matured, J. B. & Co. should make a new note for the same amount, to be indorsed by S. and discounted by plaintiff, the proceeds to be credited to S., and therewith he was then to take up the old note and pledge it to plaintiff as security for the new one; it being the intention of the parties, as the court found, that the paper so held at the death of M. was not to be paid or extinguished, but kept alive against all the parties. This arrangement was carried out. *Held*, that it did not operate as a payment of the notes secured by the mortgage; that no presumption of payment arose from the taking of the renewal notes; also that the assignment transferred to plaintiff the right to enforce the mortgage security. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2163.** It seems, that plaintiff, had there been no agreement, would have been equitably entitled to an assignment of the mortgage. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2164.** Also, *held*, that the mortgage was not one of indemnity merely, but was a security as well, against all liabilities, and that, therefore, it was not essential to a recovery to show that damages had been sustained; that the right of the mortgagees to resort to the security arose when their liability, as indorsers, was fixed. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2165.** The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2166.** Some drafts drawn by J. B. & Co. and indorsed by M. & Co., before the death of M., were taken up with the proceeds of new drafts, indorsed by S., and discounted by plaintiff, who received the old drafts in pledge under the agreement. *Held*, that the transactions were renewals, not payments, and that at least the liability of S. on the new paper was sufficient to make the mortgage available to the plaintiff as security therefor. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2167.** Defendant M. A. B. who owned an undivided interest in the mortgaged premises joined in the mortgage as security for J. B. & Co.; it was claimed on her behalf that the arrangement with the plaintiff for renewals operated as an extension of the time of payment; that after the death of M. no effectual consent to an extension, binding the firm of M. & Co., could be given, and that thereby the liability of M. & Co. was released. *Held*, untenable, as no valid agreement extending the time of payment of the original notes was shown. *Nat. Bank v. Bigler*, 83 N. Y. 51.

**2168.** An action may be maintained on a warranty without a return of the property by the purchaser. *Storrs v. Emerson*, 72 Iowa, 390.



## NEGLIGENCE.

**2169.** If one of two innocent persons must suffer a loss, he who contributed to it, or enabled another to commit a wrong, must bear it. If a party signs and acknowledges a deed, supposing it to be a lease, without reading the same, and thereby enables his grantee to sell the property to an innocent purchaser for a valuable consideration, the title will pass to such purchaser, and the grantor must bear the loss. *Gavagan v. Bryant, et al.*, 83 Ill. 376.

**2170.** The general rule, where parties are guilty of negligence, that of the plaintiff must be slight when compared with that of the defendant, and his must be gross, to authorize a recovery against him. A mere preponderance of negligence on the part of the defendant is not sufficient. *Schmidt, Adm'x v. Chicago & Northwestern Ry. Co., et al.*, 83 Ill. 405.

**2171.** Before any recovery can be had by a party receiving an injury by falling into an excavation in a sidewalk not properly protected, he must show that he had observed due care for his personal safety, and the burden of proving such fact is upon him. *Kepperly v. Ramsden*, 83 Ill. 354.

**2172.** As between two innocent persons, where one of two innocent parties is to suffer loss, it must fall upon the first one in fault. If, therefore, the equitable owner of a note loses the same, and it is found and put upon the market, and comes into the hands of an innocent and *bona fide* purchaser, the loss must fall upon the loser of the note for his negligence in not taking proper care of the same. *Gavin v. Wiswell*, 83 Ill. 215.

**2173.** An assignee of certificates of shares of stock, who leaves the certificates, with the assignments recorded, in the possession of the assignor, is not thereby guilty of negligence, so as to be estopped to set up his title against a person who claims title to the certificates through an alteration of the assignments by the fraud and forgery of the assignor. *Eaton v. Telegraph Co.*, 68 Me. 63.

**2174.** One accepting a deed of conveyance of land is bound to exercise ordinary prudence in examining the instrument, and cannot, in a suit against the grantor for alleged defects in the deed, excuse himself for this neglect upon the ground of his confidence in the grantor. *Jaeger v. Whitsett*, 3 Colo. 105.

**2175.** The employment of a common carrier is a public employment, and while he may, by special agreement, excuse himself for accidental losses, he is responsible for all damages occasioned by negligence or misfeasance, either of himself or servants, and cannot divest himself of this liability, either by special contract or notice. *Merchants' D. & T. Co. v. Cornforth*, 3 Colo. 280.

**2176.** An action may be brought by a receiver of a national bank against its directors to recover damages sustained by it, through gross negligence and inattention to their duties, at least when no proceeding is pending under the National Banking Act for the forfeiture of its charter. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

**2177.** In case the receiver is one of the directors chargeable with neglect of duty, such action may be maintained by the stockholders,

and when the stockholders are numerous the action may be brought by one or more in behalf of all. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

**2178.** It is not necessary to allege in the complaint in such an action a direction from the comptroller, or a demand upon him and a refusal to direct the receiver to bring the action, or a refusal of the receiver to sue. *Brinkerhoff v. Bostwick*, 88 N. Y. 52. Such an action may be brought in a State court. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

**2179.** The bank itself and the receiver, as such, are proper and necessary parties defendant to such an action. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

**2180.** It seems that the provision of said act (U. S. R. S., § 5239), that if the directors of a bank organized under it shall knowingly violate or permit the violation of the provisions of the act, the franchises of the bank shall be forfeited, such violation, however, to be first determined by a United States Court in an action brought by the comptroller of the currency, and in case of such violation making the directors participating therein liable for damages, applies only to violations of the act itself, by the assumption of powers in excess of the franchise granted, or by a disregard of the prohibitions of the act. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

#### NOTARY PUBLIC.

**2181.** There is no statute conferring on notaries public a general power to administer oaths and take affidavits. Such a power is not one of the incidents of the office of notary public, under the law merchant, and as it is not, by the statutes of Texas, conferred on notaries of other States, an instrument purporting to be an affidavit executed before a notary public of another State, by an appellant, stating an inability to give bond, with security, for costs, is not an affidavit, within the meaning of the statute. *Jenks v. Jenks*, 47 Texas, 220.

**2182.** The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged. And any one injured by his act has a right of action on the bond against his sureties. *Rochereau, et al. v. William McC. Jones*, 29 La. 82.

#### NON-RESIDENT.

**2183.** A foreign creditor rightfully in a court of this State, pursuing a remedy given by the statutes of the State, may enforce that remedy to the same extent, in the same manner and with the same priority of lien as a citizen. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.



## NOTICE.

**2184.** An association (not incorporated) desired to raise money, individual members made notes in large sums for the purpose and placed them in the hands of Hostetter, one of the association. The amounts being too large to negotiate, he gave his individual notes in smaller sums and retained the large notes as security for himself. Evidence tending to prove the ratification of his acts by the other members of the association was admissible in a suit upon the original notes by a holder. *Held*, that Hostetter's knowledge of the circumstances, etc., of the notes was to be imputed to the firm. *McClurken v. Byers*, 74 Penn. St. Repts. 405.

**2185.** Notice to the cashier of a bank lending on trust stocks, that the stock pledged is held in trust, is notice to the bank. *Gaston v. Am. Exch. Bank*, 29 N. J. 98.

**2186.** To release a surety, under the statute, satisfactory proof must be made, or a notice in writing, by him to the holder of the obligation, to from its date, shall be considered overdue and dishonored, does not affect the rights of the original parties to the note, but only those of third parties, as indorsers, guarantors or purchasers. *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300.

**2187.** Where a weekly publication of a notice is required, it is not necessary to show publication on the same day of each week; it is sufficient if made on any day of each week for the requisite number of weeks. *Wood v. Knapp*, 100 N. Y. 109.

## OFFER.

**2188.** Defendant not liable thereon unless plaintiffs, within reasonable time, give notice that they had accepted the offer, or had acted on it. *Claflin & Co. v. Bryant*, 58 Ga. 414.

## OVERDUE COUPONS.

**2189.** When a railroad corporation, through its president, borrowed money of its agent, and pledged with him mortgage bonds as security, although the agent could, as between himself and the corporation, only hold the bonds as security for the loan, on payment of which they should be surrendered to the company, yet a person in good faith purchasing the bonds from the agent could hold them for at least the amount he paid for them. The amount paid for the bonds may be taken into consideration in determining the question of good faith.

**2190.** And where the purchaser from an agent afterwards sells the bonds to a *bona fide* purchaser, the fact that the bonds were then overdue will not preclude the last purchaser from holding on to the bonds as indemnity for the amount he paid, although in excess of the sum originally borrowed by the company upon them.

**2191.** An honest purchaser from the agent of the company can give a good title to another, although the bonds become due before the last transfer. The question of a *bona fide* purchaser considered, as also effect of the clause making the principal due, by an omission to pay an instalment of interest. Under the circumstances of this case the last party was held entitled, in an action brought against him by the company for the recovery of the bonds, to detain them as indemnity for the amount he had paid on their purchase. *Todd v. Shelbourne*, 8 Hun, 510. Decision on all the above questions in the case of *Grand Rapids and Indiana Railroad Co. v. Joshua C. Sanders*, 54 Howard's, N. Y. 214.

## OWELTY.

**2192.** When owelty is required to equalize partition between two tenants in common, the estate of one being mortgaged, it should, if to be paid by the unincumbered owner, be paid to the mortgagee of the other and credited on the mortgage note. *Green v. Arnold*, 11 R. I. 364.



## PAROL EVIDENCE.

**2193.** Parol evidence is not admissible to vary the terms of a written contract. *Serviss v. Stockstill*, 30 Ohio, 418.

## PARTNERSHIP.

**2194.** Partner surviving of a firm may assign a promissory note payable to the late firm, by indorsement, so as to vest the legal title in the assignee, as effectually as if the note had been made payable to him. *Johnson, et al. v. Berlzheimer*, 84 Ill. 54.

**2195.** A note by a partnership to one of its members for money borrowed, may be enforced at law in the name of an indorsee not a member of the partnership, although the payee be a party defendant and the real owner of the note,—no reason appearing why a judgment at law would not do legal justice between the real parties. *Walker v. Wait, et al.*, 50 Vt. 668.

**2196.** One member of a partnership cannot bind his copartner by a promissory note for a partnership demand, made after the dissolution of the partnership. *Curry v. White*, 51 Cal. 530.

**2197.** In an action against A. for goods sold and delivered, to which the defence was payment by the negotiable promissory note of B. and C., it appeared that the plaintiff took the partnership note of B. and C. in payment. *Held*, that the declarations of one of the partners, to the effect that A. was a member of the firm, were admissible in evidence to show that the plaintiff took the note under a misapprehension, and that, if this were so, the action could be maintained. *Tozier v. Crafts*, 123 Mass. 480.

**2198.** The holder of a claim against a partnership has a legal right to have his claim established against the estate of the deceased partner, and, in the ordinary course of administration, his claim will be paid *pari passu* with other claims of the same class, without regard to the distinction between partnership and individual claims. *Higgins v. Rector*, 47 Texas, 361.

**2199.** While it is true that, after the dissolution of a partnership, the members thereof cannot create obligations which will bind the firm, or change the character or form of those already existing, still it devolves on them to give actual notice to those with whom the firm has had dealings; and any act done within the scope of the partnership, by one of the members, after its dissolution, and before actual notice of dissolution to those with whom said firm had been dealing, is binding upon all the members of such firm. Partnership notes import at law—although it is otherwise in equity—a joint, and not a joint and several obligation. *Davis v. Willis*, 47 Texas, 154.

**2200.** As by operation of law a partnership is dissolved by the death of any of its members, any agreement taking the partnership out of this rule must be shown distinctly and by evidence satisfactory. *Alexander v. Lewis*, 47 Texas, 481.

**2201.** The partnership articles contained a provision that the

special partner should bear a proportionate share of the losses. *Held*, that this was not violative of said act; that there is not in the Limited Partnership Act (1 R. S. 763, § 1, et. ap.) anything prohibiting the special partner from extending his liability by agreement with his partners, or assuming risks beyond the loss of capital. *George v. Grant*, 97 N. Y. 262.

**2202.** An incoming partner can only be made liable by agreement for the prior debts of the firm, whether he succeeds an outgoing partner by purchase, or whether, upon the death of one partner he joins with the survivors in carrying on the business. *Serviss v. McDonnell*, 107 N. Y. 260.

**2203.** An undertaking on his part, alone or in connection with others, that the new firm will pay the debts of the old firm, can be enforced only by the old firm; its creditors may not sue for a breach of it. *Ibid.*

**2204.** Whereon partner, R. M. affixed his name and seal to an instrument whose *testatum* set forth that "R. M. & Sons, by R. M., one of the firm, had thereto set their hands and seals" the instrument may be regarded as the deed of all the partners on proof that prior to the execution the others had authorized R. M. to execute the instrument, and after execution, with full knowledge acquiesced in what he had done. *Gibson v. Warden*, 14 Wall. U. S. 244.

**2205.** A member of a partnership, residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another State against all the partners after a dissolution of the firm, although the other members were served, or did appear and caused an appearance to be entered for all, and although the law of the State where the suit was brought authorized such judgment. *Hall, et al. v. Lanning, et al.*, (1 Otto.) U. S. S. C. 91, 160.

**2206.** After the dissolution of a partnership, one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm. *Quere*, whether such implied authority exists during the continuance of the partnership. *Ibid.*

**2207.** Where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person, indorsed by him in the firm name, which indorsement was without the knowledge of his partners. *Held*, that the indorsement was within the authority of the partner making it; and that the firm was liable thereon. *Steuben Co. Bank v. Alberger*, 101 N. Y. 202.

**2208.** It is lawful for an insolvent member of a firm to devote his individual property to the payment of firm debts or any debt owing by him to his partners to the exclusion of his individual creditors, and no inference of fraud can legally be derived from such disposition. *Crook v. Rindskoff*, 105 N. Y. 476.

**2209.** Where three persons form a partnership, and agree to bear the losses and share the profits of the partnership venture in proportion to their contribution to its capital, and two of the partners furnish all the money and do all the work, they are entitled to be repaid their advances out of its assets before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership business. *Hobbs v. McLean*, 117 U. S. 567.

**2210.** M., plaintiff's testator, and defendant were formerly partners



carrying on a hotel, the leases for which expired at the time fixed for the termination of the partnership. Prior to that time defendant, without the assent or knowledge of his partner, procured new leases in his own name for terms beginning at the termination of the partnership, which, upon discovery of the fact by M., he claimed to hold exclusively for his own benefit. This action was brought to have M.'s interest in the leases declared and adjudged. It appeared that during the pendency of the action M. brought another action for a dissolution of the partnership and sale of its effects. The judgment therein directed, among other things, a sale of the furniture and fixtures belonging to the firm, leaving the question as to the disposition of the leases to be determined in this action. Sale was made accordingly, the property bid off by defendant, and M. received his proportion of the purchase price. Upon the final trial herein, which did not occur until after the expiration of the new leases of which defendant had had the benefit, plaintiff was allowed to prove, as a basis for computing damages, what the furniture, good will and leases if put up for sale together would have brought, the partners each having a right to bid at the sale. *Held*, no error. *Mitchell v. Read*, 84 N. Y. 556.

**2211.** The right of a partner to sign the firm-name to a contract of indemnity in favor of third persons must be strictly proved; but it need not necessarily be proved by a written authority to him. *Moran, et al. v. Prather*, 23 Wall. U. S. 492.

**2212.** A new partner, in a firm not liable for the debts of the old firm of the same name, is not responsible for money borrowed, without his knowledge or consent, by the members of the old firm, and used to pay a debt of the old firm, the lender being aware that the money was to be so applied. *Elkin v. Green*, 13 Bush, Ky. 612.

**2213.** Two partners constituting an old firm could not bind the third partner who, with them, constituted a new firm of the same name, without his knowledge or consent, by borrowing money and using it to pay debts of the old firm, or by making and delivering to themselves the notes of the new firm, when the new was not indebted to the old firm. *Elkin v. Green*, 13 Bush, Ky. 612.

**2214.** The power of one partner to bind his copartners rests alone upon the usages of merchants, and does not amount to a rule of law in any other than commercial partnerships. In non-commercial partnerships, one who seeks to hold the firm bound upon a contract made by a single member, must be able to show either express authority, or that such is the custom and usage of the particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his copartners with the requisite authority.

**2215.** The extent of the power of a partner to bind his firm is a question of law in commercial, and a question of fact in non-commercial partnerships. The business of a commercial partnership being ascertained, and the nature of the contract made by a single member, and the circumstances attending it being known, the court may generally determine, as matter of law, whether the contract was within the scope of the implied powers of a partner. Not so, however, in reference to a contract made by a member of a non-commercial partnership.

**2216.** A partner in a non-commercial partnership does not gen-

erally possess power to bind the firm, and consequently the extent of his power is not fixed by the rules of law, but each case is left to be decided upon its particular facts; and in all such cases, in order to make out the liability of the firm, it ought to be made out affirmatively by the plaintiff that the partner had power to make the contract in question.

**2217.** A partnership engaged in the business of mining, etc., is a non-commercial partnership. A partner has no implied power to purchase land in the name of the firm in a partnership formed for the purpose of mining, etc. *Dickinson v. Valpy*, 10 B. & C. 125; *Levy v. Pyne & Richards*, 41 E. C. & L. 249; *Smith v. Sloan*, 37 Wis. 289. Sustained by the court in *Judge, Etc. v. Braswell & Co.*, 13 Bush, Ky. 67.

**2218.** Where one partner, who is in sound health, is made sole agent of the partnership by another, who is not, and who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies. *Brooks v. Martin*, 2 Wall. U. S. 70.

**2219.** On the trial of an action against B., upon an issue as to whether one W. and B. were partners, there was evidence that W. and B. were together, and had certain stock together; that B. carried a note to bank to be discounted, with a written request from W. that it should be done; that B. said that the money was for himself and W.; that they were buying stock together, and that the money was to be used in buying stock; that B. afterwards referred to the debt he and W. owed the bank, etc. Held, that the jury were warranted in finding that a partnership existed between W. and B. *Dobson v. Chambers*, 78 N. C. 334.

**2220.** Where a member of a firm of real estate brokers receives money with which to purchase land for the person advancing the same, and passes the same over to a partner, who deposits the same to the credit of the firm, and the proof fails to show that it was invested as agreed, the whole firm will be liable in assumpsit to the party so advancing, for the amount, with six per cent. interest. *Kerr, et al. v. Sharp*, 83 Ill. 199.

**2221.** Agreement between A. and B., by which A. agreed to build five houses for B. at actual cost, to be completed, etc., and the houses and the lots whereon they were built to be sold, and the proceeds of the sale, after deducting the cost of the houses and the value of the land, rated at five cents a foot, and other expenses, to be divided between A. and B. Held, that if this agreement could be construed as a partnership at all, it was one for disposing of the houses and land, not for building them. *Bisbee v. Taft*, 11 R. I. 307.

**2222.** Where one member of a firm, at its dissolution, sold all his interest in the property and accounts of the firm to his partner, who gave his note therefor, the defendant in suit upon the note by the payee, cannot set off against such note an account due from the plaintiff to the firm at its dissolution. *Wiggin v. Goodwin*, 63 Me. 389; also, *Leasure v. Norris*, 11 Cush. 328.

**2223.** Where two persons composing a partnership make and sign,



in their partnership name, a false return to the assessor of internal revenue, they may be jointly indicted therefor. *United States v. McGennis*, 1 Abbott, 120.

**2224.** Even, if in fact there be no partnership, one is liable as a partner, if he represents to another that he is a partner, and thus obtains goods from him for the partnership. *Ibid.*

**2225.** Partners have no implied authority to confess judgment for each other. An infant cannot in his own name confess judgment. An infant's assignment is not void but only voidable, and that only by the infant or some one in his right. A judgment confessed by an infant's partner in the name of the firm is void and will not support an attachment as against a previous assignee of the goods attached. *Soper v. Fry*, 37 Mich. 236.

**2226.** Foresman sold out his interest in a firm to the remaining members, who covenanted jointly and severally to pay the debts, and indemnify him against them; the remaining members continued in the same business as a partnership, took all the first firm's assets and took upon themselves the debts, without any division of Foresman's interest. Foresman paid debts of the first firm, the second firm afterwards assigned for the benefit of creditors. *Held*, that Foresman was entitled to come in as a creditor. The distribution of firms' assets is governed by the equities of the partners, not the rights of creditors. In insolvency the firm's assets go to discharge the firm's creditors before the individual property of the members can be taken. The other partner having bought Foresman out and indemnified him, he became then surety, and, having paid debts, was subrogated to the rights of the creditors. *Frow, Jacobs & Co.'s Estate*, 73 Penn. 459.

**2227.** Contracts made by one partner on behalf of the firm, in the business of the firm, are binding upon the firm. *Wilson v. Elliott*, 57 Hall, N. H. 316.

**2228.** It is a violation of good faith for any partner to stipulate clandestinely with third persons, for any private and selfish advantage and benefit to himself exclusive of the partnership; for all the partnership property and partnership contracts should be managed for the equal benefit of all partners, according to the respective interests and shares therein. If, therefore, any one partner should so stipulate clandestinely for any private advantage or benefit of himself, to the disadvantage, or in fraud of his partners, he will in equity be compelled to divide such gains with them. *McMahon, et. al. v. McClernan*, 10 West Va. 419.

**2229.** Although the most conclusive proof is not required where defendants are sued as partners, there must be some proof of partnership. Where the only proof of partnership was the evidence of the plaintiff who swore they were partners because "she knew it in business," "she had heard so," "everybody knew it," "and there was a sign on the store Uhlig & Co.," "she knew only two of the defendants, never saw and did not know the name of the third one," and which of the two defendants named Uhlig was the one she did not determine. *Held*, that there was no direct evidence of defendant's copartnership, and no proper proof of reputation to that effect, and the complaint should be dismissed for this reason. *Gulke v. Uhlig*, 55 Howard, N. Y. 434.

**2230.** An execution creditor of an individual member of a copartnership, having caused property of such copartnership to be levied on by an officer, to satisfy his debt, was, together with such officer, on application of another partner, temporarily enjoined from making sale until the partnership debts had been paid, and directed to deliver such property to a receiver appointed in such proceedings to settle the partnership affairs. On appeal by such creditor alone to the Supreme Court, such injunction was reversed as to him, and the cause remanded for further proceedings. Such receiver having subsequently sold such property and reported a distribution of the proceeds of the sale to the partnership creditors, such execution creditor instituted an action against such copartner and his surety, on the bond executed by them to procure such injunction, to recover damages resulting therefrom. *Held*, that no reversal of such injunction having been obtained as to such officer, or as to the appointment of such receiver, and such creditor having continued to be a party to such action, resulting in the sale of such property and the distribution of the proceeds thereof, the judgment therein rendered, after such reversal, the reports of such sale by the receiver, and the approval thereof by the court, were competent evidence against, and bound him. *Donellan v. Hardy*, 57 Ind. 393.

**2231.** By the levy of his execution upon partnership property, the creditor of an individual partner acquires no interest whatever in the property itself, but only a lien for the share of such partner, individually, in the surplus remaining after all partnership debts and prior liens shall have been paid. *Ibid*.

**2232.** An action at law cannot be maintained by one partner against another, involving the state of the partnership accounts. But one partner may sue another at law on a promise to pay a balance which has been ascertained and agreed upon. And a *fortiori* may an action at law be maintained on negotiable promissory notes given by one partner to another for the amount of the balance ascertained upon dissolution. And it would not be competent for the defendant to defeat such action by showing that there had been no final settlement of partnership accounts. *McSherry v. Brooks and Barton, Trustees*, 46 Md. 103.

**2233.** It is not necessary that an incoming partner should do something, in order to escape liability for the previous debts and obligations of his copartners, but on the contrary it is necessary that he should do something in order to make himself liable for such debts or obligations. *Gauss v. Hobbs*, 18 Kansas, 504.

**2234.** One partner, without the consent, expressed or implied, of his copartner, cannot apply a claim of the firm to the payment of his individual debt, even in order to retain for the firm its debtor's custom, and such attempted application with knowledge of the facts by such debtor, will not defeat an action at law upon a claim, by the firm or its assignee. *Viles v. Bangs*, 36 Wis. 131; also, *Cobyhausen v. Judd, et al.*, 43 Wis. 213.

**2235.** A sale by a partner, in payment of his own debt, of goods which are in fact goods of the partnership, but which the partnership has so entrusted to him as to enable him to deal with as his own, and to induce the public to believe to be his,



and which the creditor receives in good faith and without notice that they are the goods of the partnership, is valid against the partnership and its creditors. *Locke v. Lewis*, 124 Mass. 1.

**2236.** A community of profit and loss is the test of a partnership, even where the dispute is between the partners. Parties casually met together, who make an agreement to buy what goods they can, either jointly or separately, and on reaching the home market to sell on joint account, and divide the proceeds among themselves *pro rata*, according to the amount each should put in the venture, become partners as to such venture. Such a partnership is a trading or commercial partnership, and one of the partners may borrow money in the name and on the credit of the firm, by note, bill, or otherwise, and all will be liable. Misappropriation of the funds by the partner borrowing the money does not relieve the firm from liability. *Howze v. Patterson*, 53 Ala. 205.

**2237.** A debtor, being a member of an insolvent partnership, conveyed his separate estate in satisfaction of a debt due to a separate creditor. The real estate exceeded in value, to a considerable amount, the debt for the satisfaction of which it was conveyed. *Held*, that the other creditors had an interest in the excess, and that in equity the property conveyed would be held as a security, first, for the debt due to the grantee, and, as to the excess of value, for other debts. The real estate conveyed being the separate property of the copartner, the excess of value was bound, first, for his separate debts, and only after satisfying these was it applicable to the debts of the partnership. *Bailey, et al. v. Kennedy, et al.*, 2 Del. 12.

**2238.** An attachment of partnership property for a partnership debt will prevail over a prior attachment of the same property for a separate debt of one of the partners, or over a mortgage of one of the partners to secure his individual indebtedness. *Fargo & Co. v. Ames, et ux.*, 45 Iowa, 491.

**2239.** One cannot be fixed with liability as a partner on the ground that he has been held out as a partner unless two things occur: First, the alleged act of holding out must have been done either by him or by his consent. Second, it must have been known to the person seeking to avail himself of it. *Denithorne v. Hook*, 112 Penn. 240.

**2240.** A person who permits himself to be held out as a partner is liable as such, whether in fact a partner or not. *Brugman, et al. v. McGuire, et al.*, 32 Ark. 733.

**2241.** Accounts between partners are to be adjusted on principles of equity. *Maddox v. Stephenson*, 60 Ga. 125.

**2242.** Where one of two partners has advanced to the partnership more than the other, he cannot maintain assumpsit against the other partner for his proportion of it, so long as the partnership debts are not paid. *Mickle v. Peet*, 43 Conn. 65.

**2243.** When two or more parties, engaging in a business venture with the understanding that there is to be a communion of profit and loss, will be deemed special partners, and as such, in case of loss, severally liable for their *pro rata* share of such loss. *Stettaner Bros. v. Carney & Stevens*, 20 Kansas, 474.

**2244.** Where the evidence shows that the two individual signers of a merely joint note were, at the date of the note, commercial part-

ners, and that the consideration of the note was money borrowed for and used by the partnership, each of the makers will be liable on the note *in solido*. *Mitchell v. D. Armond*, 30 La. 396.

**2245.** When one partner in a firm borrows money, representing that it is for the use of the firm, and gives a note of the firm therefor, without the knowledge of his copartners, but appropriates the money to his own use, the firm will be liable, unless the creditor knew, or had reasonable ground to believe, the money was not borrowed for the use of the firm, or the circumstances were such as to put him upon inquiry, and he neglected to inquire. *Wagner v. Freschl*, 56 N. H. 495.

**2246.** Real estate held by a commercial firm as partnership assets, upon the dissolution of the partnership, as between the partners, vests in the individual members thereof, as tenants in common. *McGrath v. Sinclair*, 55 Miss. 89.

**2247.** Power to dispose of its property. The general creditors of a firm have no lien on its assets, any more than ordinary creditors have upon the property of an individual debtor. And the power of a firm to dispose of its property, all the members coöperating, is as unlimited as that of an individual. *Schmidlopp v. Currie*, 55 Miss. 597.

**2248.** The assignment of its assets for the benefit of its creditors, made by a defunct partnership to an individual member of a new partnership succeeding to the former business of the old concern, will not make the new partnership liable to the defunct partnership for the value of any of its assets, and therefore not amendable to a garnishment at the suit of any creditor of the defunct concern. *Bancker v. Harrington & Co., et al.*, 30 La. 136.

**2249.** A creditor of one of the partners of a firm may attach such partner's interest in a specific portion of the stock of goods belonging to the firm, and is not required, in order to render the attachment regular, to take the partner's interest in the entire stock of goods. *Fogg v. Lawry*, 68 Me. 78.

**2250.** A person, who has no interest in the business of a firm, or in the capital invested, save that he is to receive a share of the profits, as a compensation for services, or for money loaned for the benefit of the business, is not a partner, and cannot be held liable as such by a creditor of the firm. *Richardson v. Hewitt*, 76 N. Y. 59.

**2251.** Where money is loaned for the benefit of a business, and is to be refunded absolutely, without regard to the profits; the fact that the lender is to receive a share of the profits, to apply on the indebtedness, does not make him liable to creditors as a partner; to have that effect, the payment of the advancement must depend upon the profits. *Eager v. Crawford*, 76 N. Y. 97.

**2252.** A promissory note executed in the name of a certain commercial firm, in liquidation, by an agent of one of the former partners, after the dissolution of the firm, is not binding on the former members who have not given any specific authority for the execution of a note. *Dodd, Brown & Co. v. John Bishop & Co., et al.*, 30 La. 2d, Book 1178.

**2253.** A surviving partner is entitled to sue in his representative capacity for the amount due the partnership, and in his own name for the amount due to himself individually. The respective demands may be united in the same action, but should be separately stated. *Quillen v. Arnold*, 12 Nevada, 235.



**2254.** Where a loan is made by two members of a commercial firm, in a matter foreign to the business of the firm, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount. *David G. Cooke v. Hugh and Andrew Allison*, 30 La. 963.

**2255.** Where a creditor of a former commercial firm sues its individual members for goods sold to the firm, and declares in his petition on the itemized account of the goods, and also on a promissory note of the firm, given in liquidation of the account by one not authorized to sign for the firm, he will be entitled to recover for the goods, on the unopposed proof of their sale and delivery. One who acts in such a manner as to induce others to believe that he is a member of a certain partnership, makes himself liable to them as a partner. *Dodd, Brown & Co. v. John Bishop & Co., et al.*, 30 La. 1178.

**2256.** A party seeking exemption from the liability of a general partner, under the Act of 1874, respecting limited partnerships, must show a strict compliance with the act. The statute does not require that the capital should be paid in cash; but when it is paid in property, it should be so stated, and its cash value given. *Holliday, et al. v. Union P. & B. Co.*, 3 Colo. 342.

**2257.** In an action brought by one member of a partnership to have an accounting with his two partners, and to recover a balance due him, where the referee reports that such plaintiff contributed \$663.48 to the capital, and the other two partners \$370, and that certain profits were realized from their business, and that by the terms of the partnership the parties were to share equally in the profits thereof, *held*, that each member of the firm, on dissolution of the partnership, is entitled to a return of his capital, and in addition one-third of the profits. *Norman v. Conn.*, 20 Kansas, 159.

**2258.** The individual members of a commercial firm may execute a valid note, and a valid mortgage securing said note on their individual property, in favor of the firm, and any third person acquiring the note from the firm, in good faith, for value, and before maturity, may enforce its payment. *Pike, Brother & Co. v. Hart & Hebert*, 30 La. 868.

**2259.** Service upon member of;—Service upon one of the firm, after dissolution, confers jurisdiction to render a judgment which may be satisfied out of the partnership property, or the individual property of the member served, but confers no jurisdiction of a partner not served. A judgment having been obtained upon a promissory note, the note became merged in the judgment, and could not afterwards be made a cause of action. *Hartford, Thayer & Co. v. Street*, 46 Iowa, 594.

**2260.** When all the partners are in a situation that would authorize their individual creditors to sue out attachments against them respectively, a creditor of the firm may procure an attachment against the partnership, and have the same levied upon the partnership effects. *Starr v. Mayer & Co.*, 60 Ga. 546.

**2261.** R. S., c. 82, § 87, provides that when the legal representative of a deceased person is a party, he may testify to any facts, legally admissible upon the general rules of evidence, happening before the death of such person. *Held*, that the surviving partner, who

gives bond under R. S., c. 69, § 2, and is afterwards sued upon a note of the firm, is not, therefore, a representative of his deceased partner, and as such entitled to testify to facts happening before his decease within the provisions of c. 82. *Holmes v. Brooks*, 68 Me. 416.

**2262.** Note in renewal of another made by same partner who signed the last, which itself was in renewal of a note by a different firm, of which the signer had been a member, upon plea of *non est factum* by the copartner, *onus* of showing authority to sign is on the plaintiff. *Bryan v. Tooke, et al.*, 60 Ga. 437.

**2263.** One partner in a mercantile business has power to bind the others by a promissory note given in the usual course of business, and the payee of a note, executed by a partner in the firm name, has the right to presume that it was executed in the usual course of business. *Sherewood v. Snow, Foote & Co.*, 46 Iowa, 481.

**2264.** The fact that the partner signed his individual name before signing that of the firm, should be considered by the jury in determining whether or not the payee had reason to know that the consideration was procured for his own individual use. *Ibid.*

**2265.** The creditors of a corporation selected three of their number, who were elected directors of the company, and charged with the management of its business. *Held*, that they could not be made liable as partners for supplies furnished them and used in the conduct of the corporation business. *Beeson v. Lang*, 85 Penn. St. 197.

**2266.** The fact that the owner and shipper of property is doing business in the name of a firm in violation of the provisions of the Act (chap. 281, Laws of 1833), "to prevent persons transacting business under fictitious names," and that the property is marked with the firm name, is no defence to an action by such owner against a railroad corporation for loss of, or damage to the property while in transit. The said act, being highly penal, will not be extended by implication or construction to cases not within the terms of the act fairly interpreted. *Wood v. E. R. R. Co.*, 72 N. Y. App. 106.

**2267.** An ordinary partnership cannot be held liable for the individual debt of one of its members because of an agreement to that effect between that member and his creditor, unless it be proved that the member was authorized to make the agreement by his copartners, or that his agreement was ratified by them, or that the partnership was benefited by the transaction. *W. E. Hamilton, et al. v. Nellie Hodges, Tutrix, et al.*, 30 La. 1290.

**2268.** In a feigned issue to try the right to certain cattle, A. offered evidence that he purchased the cattle through B., who was his agent, in the name of B.; that it was agreed that the latter should butcher and sell the meat, and out of the proceeds return to A. the cost and one-fourth of a cent per pound of dressed meat additional, and that B. should have the balance. Upon this evidence the court granted a non-suit, on the ground that it did not tend to prove an exclusive ownership in A., but established a partnership. *Held* (reversing the court below), *inter se*, or as to third parties, and that the case should have been submitted to the jury to say what was the actual relation of the parties. *Dale v. Peirce*, 85 Penn. St. 474.

**2269.** Partners cannot, during the existence of the partnership, claim individual exemption in partnership property, when taken under



legal process for partnership debts. (Overruling in this particular, *Howard v. Jones & Starke*, 50 Ala. 67; *Dunklin v. Kimball*, 50 Ala. 251; and *Giovanni v. First Nat. Bank*, 51 Ala. 177.) *Giovanni v. First Nat. Bank*, 55 Ala. 305.

**2270.** Where no other relation exists between the shareholders of a steamboat than that which arises from the joint ownership, they are not partners, nor is their liability to be measured by the rules of law peculiar to the partnership relation. When one of the shareholders sells out his interest in a steamboat, and the bill of sale, in accordance with the Acts of Congress, is duly acknowledged, and recorded, it is valid notice to all parties and subsequent creditors with whom the owners may contract. *Adams v. Carroll & Co.*, 85 Penn. St. 209.

**2271.** During the existence of a partnership, which is neither bankrupt nor contemplating bankruptcy, one of the members of the firm may, with the consent of the other partner, or partners, upon a *bona fide* consideration, with no benefit reserved, assign and transfer the assets of the partnership in payment of his individual debt, if no lien has attached to such assets; and such transfer is good against the firm creditors. *Schmidlapp v. Currie*, 55 Miss. 597.

**2272.** Where accounts are kept at a bankers by a firm, each partner having a right to draw checks, and also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts. Upon the death of one partner in the firm having an account at a bankers, the surviving partner has a right to draw checks upon the partnership account. *Backhouse v. Charlton*, English Chancery Division, Law Reports, 1878.

**2273.** It is only in equity that separate creditors of a partner are entitled to preference over the creditors of a partnership in the distribution of the separate effects of their debtor. The lien of a subsequent judgment for an individual debt does not take priority over the lien of a judgment first rendered against a debtor upon a partnership debt. *Gillaspy v. Peck, et al.*, 46 Iowa, 461.

**2274.** In partnership suits the defence of the Statute of Limitations is not available, unless six years have elapsed before the filing of the bill since the dealings of the partners wholly ceased. A partnership was formed between two civil engineers and architects, the profits of which were to be divided in shares of three-fifths and two-fifths. During the continuance of the partnership they invested moneys of the partnership in the purchase of real estate, which resulted in a loss. Held, that the loss was to be borne by the partners in the same proportion as they were to share the profits and loss of their other business. *Storm v. Cumberland*, 18 Grant's Chancery, Ontario, 245.

**2275.** When a party fraudulently misappropriates the money of his firm, and purchases, in his own name, real estate and policies of life insurance with firm funds, he will in equity be charged, by construction, as a trustee for the partnership. When all the premiums are paid with partnership moneys, it makes no difference that the fraud doer, in his lifetime, changed the life policies so as to make them payable to his wife. She, having paid no consideration for them, will be charged as a trustee for the firm, and will be permitted to derive no benefit from them. *Shaler v. Trowbridge*, 28 N. J. Eq. 595.

**2276.** Acceptance by one partner for separate debt, and not in partnership name—liability of copartners. Where the plaintiffs, a bank, discounted a bill, drawn by one partner, and accepted by him in the name of the firm, the manager being aware that it was intended by such partner to reimburse himself for moneys which he alleged that he had advanced to the firm, and it appeared that such acceptance was unauthorized by the other partners, *Held*, that the bank could not recover against them. The partnership name, when the bill was so drawn and accepted, was J. S. W. & Co., and the acceptance was in the name of W. M. & Co. *Held*, that this also would have been fatal to the plaintiffs' recovery. *Royal Canadian Bank v. Wilson, et al.*, 24 Upper Canada Com. Pleas Repts. 3620.

**2277.** Real estate purchased with partnership funds for partnership purposes, and appropriated to partnership uses, is in equity presumed to be partnership property, and it is, under such circumstances, immaterial whether the legal title is taken in the name of a part or all of the partners. Individual real property brought into the partnership by the copartners, at the time of its formation or afterwards, and, by proper agreement of the partners, converted into partnership property, and appropriated to its uses, becomes a portion of the capital stock of the firm, and will be treated in equity as personalty, although standing in the name of an individual partner. *Hoyle v. Lowe*, 12 Nevada, 286.

**2278.** When the property of an insolvent partnership is ordered to be sold, in order to pay the partnership debts, the right of redemption does not exist. *Rhodes v. Williams*, 12 Nevada, 20.

**2279.** When a non-resident commercial firm make an agreement with two resident firms, in virtue of which agreement one of the resident firms is to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the non-resident firm, is to pay for the merchandise, and each of the resident firms agree to receive, instead of fix sums in payment of their services, certain proportions of the profits to arise from the subsequent sales of the merchandise, and also agree to share in any losses resulting from said sales. *Held*, that such an agreement will not make the said firms commercial partners, even as to third persons, when it appears that they did not *intend* to form a partnership, and that they have not held themselves out to the world as partners. *Chaffraix & Agar v. John B. Lafitte & Co.*, 30 La. 631.

**2280.** In 1865, after June 1st, a partner retired, selling out to his copartner his interest (one-half) in the stock, at cost or invoice prices. The retired partner died; and in October, 1866, administration was granted upon his estate. A suit was commenced against the administrator in August, 1873, by the former partner of the intestate upon a certain award, to which suit the administrator pleaded in January, 1874, among other things, that at the time of the dissolution the stock was worth over \$1,500, and that he, the administrator, claimed to be entitled to one-half thereof, with interest. He neither expressly offered to set off the claim, nor prayed judgment therefor. The action and the plea remained pending until February, 1877, when the action was voluntarily dismissed by the plaintiff therein. The administrator in July thereafter filed the present bill to recover for his intestate's in-



terest in the stock. The bill was barred by the Statute of Limitations, and a demurrer, containing that ground among others, was properly sustained. *Crane v. Barry*, 60 Ga. 362.

**2281.** Partners are liable for goods furnished for use of the firm even though the vendor was ignorant of its existence and supposed at the time of the sale that he was dealing with and giving credit solely to one of the partners. *Reynolds v. Cleveland*, 4 Cow. 282.

**2282.** A creditor of a partnership is at liberty to prove the fact of the partnership, as he alleges it to be, without regard to the manner in which parties have arranged their affairs between themselves. He is not concluded by their written contract or agreement as to the relation they sustain to each other. *Reed, Crone & Co. v. Kremer & Co.*, 111 Penn. 482.

**2283.** The firm of C. F. P. & Co. made their promissory note payable to their order and indorsed the same. L., one of the firm of J. S.'s Sons, indorsed his own name and the name of the latter firm thereon without their knowledge or consent, and delivered it to a firm to whom he was individually indebted to be applied upon the debt, who transferred the note to plaintiff for value, before maturity, plaintiff having no notice of the circumstances attending the execution of the note. In an action against the members of the firm of J. S.'s Sons upon the indorsement, *held*, that the defendants were liable. *At. State Bank v. Savery*, 82 N. Y. 291.

#### PAYABLE AND PAYMENT.

**2284.** When a promissory note is made in this State, payable in a bank named but not located, it will be presumed, unless the contrary appear, that the bank is located in this State. *Henderson v. Ackelmire*, 59 Ind. 540; also, *Burroughs v. Wilson*, 59 Ind. 536.

**2285.** If the payee of a draft present and surrender it to the drawee, on receiving his check for the amount, which he neglects to present until the next day, the drawee is discharged. *Smith v. Miller*, 43 N. Y. 171.

**2286.** Money voluntarily paid in discharge of a claim made upon the payor, or to buy off from and quit a criminal prosecution to which he is exposed, cannot be recovered. *Comstock v. Tupper*, 50 Vt. 596.

**2287.** The payment to the sheriff of the redemption money, under foreclosure, in United States treasury notes, and national bank notes, which were received without objection, *Held*, sufficient. *Nopson v. Horton*, 20 Minn. 268.

**2288.** Where, at the time of sending a draft, the sender was, as a member of a firm, indebted to the party whom the draft was sent, in several notes, most of which were then due and bearing interest, and also in two individual notes, not then due, and maturing some time afterwards, and which bore no interest before maturity, and the debtor, at the time of sending the draft, directed the creditor to hold the amount until advised as to its application, and stating that his partner would send a statement of matters in a few days, and such partner did afterwards write, giving a statement as to the firm notes, with their

interest up to the time of sending the draft, and the other debtor made no other direction for several months after, and not until the creditor had applied the draft upon the firm notes, it was *held*, that the creditor was, under the circumstances, justified in making the application he did, and being rightfully made, it could not be repudiated by the debtor afterwards. *Lewis v. Pease*, 85 Ill. 31.

**2289.** Where a mortgagor of land is the executor of the will of the mortgagee, and charges himself with the amount of the mortgage debt, as assets in his hands as executor, this operates as a payment of the debt and a discharge of the mortgage. *Martin v. Smith*, 124 Mass. 111.

**2290.** A creditor who holds notes or other obligations for the payment of money assigned to him by his debtor as collateral security, and neglects to use reasonable diligence to collect them when due, must bear the loss thence accruing. In an action by such creditor against the debtor, the burden is upon the latter to show that the loss upon the collaterals was caused by the creditor's negligence. *Charter Oak Life Ins. Co. v. Smith, et al.*, 43 Wis. 329.

**2291.** A stipulation in a promissory note that no credit shall be allowed on it unless indorsed upon it by the payers, will not prevent the allowance in an action upon the note, of any authorized payment actually made, but not indorsed. *Kasson, et al. v. Noltner*, 43 Wis. 646.

**2292.** On March 27, 1873, the firm of C. A. B. & Co., being indebted to plaintiff, an oral agreement was made between them, by which plaintiff agreed to extend the time of payment upon receiving, as collateral security, a mortgage, executed by defendant, E., the wife of C. A. B., who had no interest in the firm, upon lands owned by her. In pursuance thereof, said firm upon that day executed and delivered to plaintiff their notes for the amount of the indebtedness. On the day the first of the notes fell due, said firm sent to plaintiff checks for the amount thereof, with intent to pay, and requested the same to be applied in payment of the note. Plaintiff objected to such application, and requested that the checks should be applied on the open account of the firm, stating that, if insisted upon, the application would be made in payment of the note; but in that case, the account with the firm would be closed, and payment required and no further credit given. This was not expressly assented to, but no further direction was given as to the application, no demand was made for the note, and the firm continued to purchase, and the plaintiff to sell on credit. Plaintiff, soon after the interview, credited the checks in the open account and delivered to the firm receipted vouchers, showing such application. *Held*, that this did not amount to a payment of the note; but the facts showed an acquiescence of the parties in the application made. *Penn. Coal Co. v. Blake*, 85 N. Y. 226.

**2293.** Payment to an officer who has a valid warrant for the collection of such an assessment and who threatens to execute the same, is not a voluntary payment. *Bruecher v. Village of Post Chester*, 101 N. Y. 240.

**2294.** No demand for a return of the money so paid is necessary before the commencement of an action to recover the money. *Ibid.*

**2295.** Payment to agent who receipts in full, when only author-



ized to receive payment on account, *held* not good, even on account. *Curtis v. Innerity*, 6 How. U. S. 146.

**2296.** Where the draft of a third party is received by a creditor from his debtor for a preëxisting debt, the presumption is that it was received as a conditional payment, unless there was an agreement that it was to be an absolute payment, and the burden then of proving such an agreement is upon the debtor. *League v. Waring & Co.*, 85 Penn. 244.

**2297.** Taking a note from the debtor or a note of a third party, is no discharge of the debt, unless it is expressly agreed between the creditor and debtor that it is in absolute payment thereof. *Dunlap's Err. v. Shanklin*, 10 West Virginia, 662.

**2298.** A bank check given and accepted by the partners to it as payment of the balance found due upon accounting together, is such a payment as will entitle the drawer to be discharged, if summoned as trustee of the payee, in an action in which the writ is served on the day after such payment, although the check is not presented and paid at the bank on which it is drawn until the next day. *Getchell v. Chase*, 124 Mass. 366.

**2299.** Partial payments are applied when their sum equals or exceeds the interest, not before. *Houston v. Crutcher*, 31 Miss. 51; overruled in *Brooks v. Robinson*, 54 Miss. 272.

**2300.** When partial payments are made on a debt past due (Rev. Code, § 1830), they should be applied first to the extinguishment of the accrued interest, and only the residue be applied to the principal. *Coleman v. Smith*, 55 Ala. 369.

**2301.** In an action upon a promissory note money paid by the maker after the date of the note and not indorsed thereon, will not be allowed as a credit, if there is nothing in the record to show it was paid as such. *Craig v. Young*, 2 Colorado, 112.

**2302.** A married woman owning land joined with her husband in a mortgage which was assigned to a bank; in a *scire facias* on it the verdict was for her. She sold part of the land; the purchaser paid the purchase-money to the bank in order to procure a release of the mortgage. *Held*, that she could not recover money from the bank. One who voluntarily pays money with knowledge or means of knowing of the facts, and without fraud on him, cannot recover it because he paid in ignorance of the law. *Real Estate Saving Inst. v. Linder*, 74 Penn. St. 371.

**2303.** Where the vendee of real estate contracts to pay the purchase-money in cash or by the delivery of cotton of a specified class at a designated place, as the payments become due, at his option, the right of election is not lost by the failure to deliver the cotton at the time and place, where it is brought about by the conduct of the vendor. *Brodie & King v. Watkins and wife*, 31 Ark. 319.

**2304.** A payment of part of a debt before due, is a consideration sufficient to support a contract to give time. *Hartman v. Danner*, 74 Penn. St. 36.

**2305.** The owner of a note secured with other debts by mortgage, as a consideration for extension of time received a new note indorsed by defendant, which not having been paid, the mortgage was foreclosed and property sold for less than enough to pay the other debts. *Held*,

that such owner was entitled to apply proceeds of sale to the payment of the other debts. See *W. Tr. & C. Co. v. Kliderhouse*, 87 N. Y. 430.

**2306.** Money paid under a mutual mistake for that which has no legal existence or validity, may be recovered back as paid without consideration, where the vendor is responsible for the mistake, or represents the person so responsible. So held, of the *bona fide* transfer by executors of a certificate of an execution sale that turned out to be void, but which had been issued to their testator. *McGoren v. Avery*, 37 Mich. 120.

**2307.** Any third person, who demands no subrogation, may tender to a creditor, either in his own name, or in that of the debtor, the debt due by the latter, in whatever species of property the debt is payable, and compel the creditor to accept the payment in that property. *State ex rel. John Klein & Co. v. Ed. Pilsbury, Adm'r of Finance, etc.*, 29 La. 787.

**2308.** By the law of this commonwealth, the giving of the negotiable promissory note of a third person is evidence of payment of a preëxisting debt, and sufficient where there is nothing to defeat the inference or show that such was not the intention of the parties; and in the absence of evidence to the contrary, the rule will be presumed to be the same in Maine. *Ely v. James*, 123 Mass. 36.

**2309.** In an action brought for the purpose of establishing the payment of a promissory note between parties not traders, *Held*, reversing judgment of court below, that the question was one which must be governed by the laws of England and may be made by parole evidence. *Carden, et al. & Finlay, et al.*, 8 L. C. J. 139, and 10 L. C. R. 255, Q. B. 1860, 1233, section 1, and 2341 C. C.

**2310.** If the holder of notes by agreement accepts of the maker policies of insurance covering property destroyed by fire, upon which there is a *prima facie* cause of action, in discharge of the notes, in the absence of fraud he will be bound by the contract, and the maker, when sued on the notes, need not show that a complete cause of action existed in his favor on the policies, to make his defence availing. *Brunswick v. Birkenbend*, 83 Ill. 413.

**2311.** If a party with full knowledge of all the facts in the case voluntarily pays money in satisfaction or discharge of a demand unjustly made upon him, he cannot afterwards allege such payment to have been made by compulsion and recover back the money. *Murphy, Neal & Co., et al. v. Creighton*, 45 Iowa, 179.

**2312.** Where property belonging to a firm is mortgaged to secure a note executed in the firm name, a partner has a right to invest upon a foreclosure of the mortgage before a personal judgment can be rendered against him upon the note. In case the party shall pay the note executed by the firm, he then becomes subrogated to the rights of the mortgagee, and his lien will be prior to that of a mortgage executed upon the same property by a grantee of the firm. *Warren v. Hoyzlett*, 45 Iowa, 235.

**2313.** An indorsement of a partial payment on the back of a note, when the fact of the payment is controverted by the payor or his representative, is not evidence sufficient to suspend the running of the statute of limitations. The burden of proving that the payment in-



dorsed on the note was actually made, and at the time it purports to have been made in the indorsement, when the alleged payment is controverted, is upon the holder of the note, in a case where he claims that the running of the statute of limitations was suspended by the legal payment. *Frazer's Adm'rs v. Frazer & Co.*, 13 Bush, Ky. 397.

**2314.** An action lies on a note payable by installments as soon as the first day of payment is passed, but it lies only for the amount of the first installment, each of them being considered as a separate debt. *Clarihue v. Morris*, 2 Rev. de Leg., 30 K. B. 1820.

**2315.** A sale of goods upon a mere promise by the purchaser to pay for them out of the avails of their sale, and of a stock of other goods owned by the purchaser, where the transaction is understood by them to create no relation between them but that of debtor and creditor, does not give the seller a lien on the goods, after their delivery, or on the avails of their sale, that can be specifically enforced; nor does it deprive the purchaser, where he owes the seller several debts, of the right to direct, when he makes a payment to such creditor, which debt shall be paid thereby. *Stewart v. Hopkins*, 30 Ohio, 502.

**2216.** Where a person owes another several distinct debts, he has the right to choose which debt he will pay first; and where, at the time of payment, he expressly directs what application is to be made of the payment, the creditor, if he retains the money, is bound to appropriate it as directed by the debtor. The creditor cannot divert a payment so made by his debtor, from the appropriation made by him, upon mere equitable considerations, that do not amount to an agreement between the parties, giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable considerations may control, where the payment is made without designating its application. *Stewart v. Hopkins*, 30 Ohio, 502.

**2317.** Payment of part of a debt without release under seal, although received in full satisfaction, will not discharge the debt. *Hartman v. Danner*, 74 Penn. St. 36.

**2318.** A bonus is not a gift or gratuity, but a sum paid for services upon a consideration in addition to or in excess of that which would ordinarily be given. *Kenicott v. The Supervisors*, 16 Wall. U. S. 452.

**2319.** When a payment is made voluntarily on an unfounded demand, or in ignorance of the law or legal circumstances of the case, it cannot be recovered back. Nothing occurring afterwards in the determination of new controversies between other parties can be carried back to affect a transaction which when it took place was fair and just. *Finnell v. Brew*, 81 Penn. St. 362.

**2320.** When the debts are of like nature, the imputation of payments is made to the debt longest due. *Bloom & Co. v. Kern*, 30 La. 1263.

**2321.** Payments made voluntarily by the mortgagee of claims against the estate, which was not necessary for the protection of his own interest in the property, will not entitle him to be subrogated to the rights of the creditors whose liens he discharged. *Bayard, et al. v. McGraw*, 1 Bradwell's, Ill. App. Rpts. 134.

**2322.** Partial payments made on a debt past due (Rev. Code, s. 1330) should be applied first to the extinguishment of accrued inter-

est, and only the residue applied to the principal. *Coleman v. Smith*, 55 Ala. 369.

**2323.** Payments claimed as credits on a debt, and not allowed when judgment was rendered on it, cannot be recovered back afterwards, without an express promise to repay them. *Turlington v. Slaughter*, 54 Ala. 195. Payment of a debt made by giving several notes, and only a part of the notes are paid, the original debt is revived as to the notes unpaid. *Crawford v. Roberts*, 50 Cal. 236.

**2324.** The taking of the debtor's acceptances does not operate as payment of the debt in the absence of an agreement that they should be received in payment. *Au Sable River Broom Co. v. Sanborn*, 36 Mich. 358.

**2325.** On a suit against six joint and several makers of a note, when some had paid off their shares of principal and interest due at the time paid, by agreement with the payee, the said payments ought to be applied to the *pro rata* of principal as well as interest due by the makers so paying their shares; and that the verdict against all the defendants for the balance, due after said payments are so credited, is legal and valid, and ought to be upheld, especially where the evidence as to how many of the shares which have been so paid is conflicting, and if some of it was believed by the jury, and the payments had been credited on the note, the verdict would be too large. *Donaldson v. Cothran, Adm'r, et al.*, 60 Ga. 603.

**2326.** As a general rule, the premium note of an insurance broker, received by the insurers in payment of a policy for his principal, discharges the principal from liability to the insurers on account of the premium. But if the policy contain a provision that, in case of loss, the amount of the premium note shall be deducted from the insurance, the insured must submit to the deduction, although he has before paid the amount of the premium to the broker. In case of the death and insolvency of the broker, a court of equity will not compel his administrators to sequester for the benefit of the insurers any sum received by them from the insured on account of premiums, if the company hold the broker's note therefor. *Union Ins. Co. v. Grant*, 68 Me. 229.

**2327.** The payment of money cannot be made dependent on the performance of a condition by the party to whom it is to be paid, which condition, by its terms, may not be performed until after the date at which the money is to be paid. *Front St. M. & O. R. R. Co. v. Butler*, 50 Cal. 574.

**2328.** A legal presumption of payment of a bond, given for the payment of money, does not arise from mere lapse of time, where the bond has not been due for twenty years, before commencement of suit by the recovery of the sum thereby due and payable. If a shorter period, even a single day less than twenty years, has elapsed, the presumption of satisfaction from mere lapse of time does not arise. While the mere lapse of twenty years, without explanatory circumstances, affords a presumption of law that the debt is paid, even though it be due by specialty, still payment may be inferred by the jury from circumstances with the lapse of a shorter period of time than twenty years. *Sadler's Adm'r v. Kennedy's Adm'rs*, 11 W. Va. 187.

**2329.** Plea of payment tried by a magistrate, and found for defendants on the evidence, cannot be changed on appeal so as to defeat



such defence, by adding *uses* for whom plaintiffs sue. *Copp, et al. v. Lowry & Co.*, 60 Ga. 637.

**2330.** Where plaintiff held several promissory notes against deceased, all but one being valid, and also held certain shares of mining stock belonging to deceased. *Held*, that, in the absence of any showing to the effect that the deceased ever authorized plaintiff to appropriate the proceeds derived from the sale of such stock toward the discharge of the fraudulent note, the law compelled plaintiff to credit the money on the valid notes. *McCausland v. Ralston*, 12 Nevada, 195.

**2331.** When payment, by savings bank, of deposit of trust fund, to administrator of trustee will discharge the bank. *Boone v. Citizens' S. Bank*, 84 N. Y. 83.

**2332.** Payments made by a debtor, without special instructions as to their imputation, will be imputed in accordance with the tacit agreement of the parties, as disclosed by their dealings and correspondence. A debtor, who receives without objection an account current from his creditor, which imputes payments made by him to the less onerous part of his debt, is held to ratify by his silence the imputation of payment made in the account. *McLear & Kendall v. Succession of Hunsicker*, 30 La. 1225.

**2333.** The defendant was indebted to the plaintiff—first, as he was member of a firm, and afterwards individually, and gave his note in payment, taking back this receipt: "Received from F. S. Brewer his 90 day note for \$300, to be paid at either bank in Portland." There was a contention on the joint account of the defendants, or on the several account of Brewer. *Held*, that upon this issue it was not error to instruct the jury that the receipt was silent and could have no legitimate bearing one way or the other. *Hunt v. Brewer*, 68 Me. 262.

**2334.** A. sent B. to do work for C., and A.'s bookkeeper, after the completion of the work, made out, in accordance with his duty, the bill therefor upon one of A.'s printed billheads, which he placed in the hands of B., who demanded and received payment for the work from C. Upon the billhead was printed, in fine type, "All moneys to be paid to the treasurer, and bills to be receipted by him." *Held*, that the bill so made out by their bookkeeper, and by him put in the hands of Thayer, and by Thayer shown to the defendant, was sufficient evidence of Thayer's authority to justify the defendant in paying him the amount of the bill, if the defendant acted in good faith, and without having observed the words in fine print at the top of the bill requiring all moneys to be paid to the plaintiff's treasurer. The case was rightly submitted to the jury. *Kinsman v. Kershaw*, 119 Mass. 140.

**2335.** The United States is entitled to priority of payment out of the effects of its bankrupt or insolvent debtor, whether he be principal or surety, or be solely, or only jointly with others, liable, and it is immaterial when the debt was contracted. *Lewis, Trustee v. United States*, 92 U. S. 618.

## PLEDGES.

**2336.** If a certificate of stock in a corporation, pledged as collateral security, is transferred by the pledgee to a creditor of his own, the pledgor may treat this as a conversion, and the fact that the pledgee had a greater number of shares standing to his credit on the books of the corporation is immaterial. *Fay v. Gray*, 124 Mass. 500.

**2337.** A. borrowed of a bank money on call, and deposited with it as collateral security certain mining stocks, with written authority to sell them at its discretion. The loan remaining unpaid, the bank notified him that, unless he paid it, the stock would be sold. He failed, after repeated demands, to pay it, and they were sold, for more than their market value, to three directors of the bank, and the proceeds applied to the payment of the loan. A., who was advised of the sale, and that enough had been realized to pay his indebtedness, made no objection. The stocks were transferred to the purchasers. Nearly four years after the sale, the stocks having in the meantime greatly increased in value, A. notified the bank of his desire and purpose to redeem them, and subsequently filed his bill against it, asserting his right so to redeem, and praying for general relief. *Held*, that he is entitled to no relief. *Hayward v. National Bank*, 96 U. S. 611.

**2338.** The subsequent bankruptcy of the pledgor of a negotiable instrument does not deprive the pledgees of their right to dispose of it upon his default. *Jerome v. McCarter*, 94 U. S. 734.

**2339.** One who lends money on the pledge of stock held in trust, will be held to have had notice that the trustee was abusing his trust and applying the money lent to his own purposes, when the certificates of the stock pledged show on their face that the stock is held in trust (though the name of the *cestui que trust* does not appear), and when the loan was apparently for the private purposes of the borrower, and that fact would have been revealed by inquiry. *Gaston v. Am. Ex. Bank*, 29 M. J. 98.

**2340.** To constitute a pledge, there must be a delivery and retention by the pledgee of the thing pledged. If a party receives a pledge as collateral security, and in course, or at any time after he receives it, suffers it to go back into the possession of the person by whom it was pledged, the moment that he yields up the possession of it, he yields his right, and any subsequent purchaser, or an attaching creditor, would be entitled to hold it against him. *Collins v. Buck*, 63 Me. 459.

**2341.** A pledgee of a chattel may sell his interest in the same, and the owner cannot recover the same of the purchaser without tendering him the sum due thereon, and if the pledgee is suffered to retain possession after tender of the sum due, and a sale is made to an innocent purchaser, who has no notice of the fact of its being only a pledge, the latter will acquire the title, even as against the real owner. *Bradley v. Parks, et al.*, 83 Ill. 169.

**2342.** The pledgee of stock is entitled to the dividends accruing while he holds the stock. *Gaty v. Holliday*, 8 Mo. App. 118.

**2343.** If the pledgor collects the dividends from the corporation



he receives them to the pledgee's use, and an action to recover them will lie by the latter against the former. *Ibid.*

**2344.** Though a pledgee cannot purchase the pledge so as to acquire an absolute title without the consent of the pledgor, yet such assent may be presumed where the facts are notorious and no dissent is shown. *Carroll v. Mullanphy Savings Bank*, 8 Mo. App. 249.

**2345.** It was held by the Supreme Court of Illinois, that the pledgee of mortgage bonds payable upon condition, like the pledgee of commercial paper, held as collateral security for a debt, has no right, in the absence of an express power so to do, to sell security and apply the proceeds in extinguishment of the debt. But it is his duty to hold the same and collect when due, and apply the proceeds to extinguish the debt secured. *Joliet Iron and Steel Co. v. Scioto Fire and Brick Co.*, 80 Ills. 337.

**2346.** Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to the property as the means of reimbursement, he becomes the owner instead of a pledgee, and so remains until the mover in the transaction pays the purchase price, and his relation to the latter is that of an owner under a contract to sell and deliver when the purchase price is paid. *Moors v. Kidder*, 106 N. Y. 32.

**2347.** The pledge of commercial paper as collateral security for the payment of a debt, does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged, to sell the securities so pledged, upon default of payment either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge, occupies the relation of trustee for the owner, and as such, in the absence of special power to be otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case property can only be applied as security through the process of sale. Not so with bonds, mortgages, or promissory notes. *Wheeler v. Newboulds*, 16 N. Y. 392. The pledgee's title to negotiable bonds, he being the *bona fide* holder of them for value, is good against all the world. *Gibson v. Lenhart, Receiver*, 111 Penn. 624.

**2348.** Where the pledgor of a chattel, after tendering the sum due the pledgee, takes no steps to recover possession, he will authorize others to regard the pledge as still subsisting, and if purchased by another he cannot recover the same in replevin, without tendering the sum due, to such purchaser. *Ibid.*

**2349.** Possession by the pledgee is essential to a pledge; actual possession when practicable; constructive possession when actual possession is impracticable. *Seymour v. Colburn*, 43 Wis. 67.

**2350.** A pledge is the lien created by the delivery of personal property by the owner to another, upon an expressed or implied agreement that it shall be retained as a security for an existing or future debt. To create a pledge, the pledgee must have the possession and control of the property. *Corbett v. Underwood*, 83 Ill. 324.

**2351.** J. A. H. borrowed \$5,000 from the Citizens' National Bank of Baltimore, and deposited as collateral security for the payment thereof a note of W. H. & Sons, and a \$100 U. S. bond. Next day,

he gave to the bank his individual check on himself for the amount so borrowed, and the bank delivered to him the collaterals before deposited. Shortly afterward J. A. H. failed, and it was discovered by the bank that he had returned the note to the drawers, W. H. & Sons, who on demand refused to deliver up to the bank the note or its value. In an action by the bank to recover from W. H. & Sons the value of the note, it was *held*,

**2352.** 1st. If a bank or other party take a negotiable bill or note before maturity, for consideration and without *mala fides*, such party acquires a good title, notwithstanding there may have been negligence; and gross negligence, while it may be evidence of *mala fides*, will not alone be sufficient to defeat the plaintiff's title.

**2353.** 2d. Nothing less than proof of knowledge of facts that show the want of authority on the part of the person transferring the note, will be sufficient to defeat the plaintiff's title.

**2354.** 3d. The plaintiff is not bound to make inquiry, and mere negligence, however gross, not amounting to wilful and fraudulent blindness, while it would be evidence of *mala fides*, is not the same thing.

**2355.** 4th. It makes no difference that the bill or note is only pledged as collateral security, and is not absolutely and unconditionally transferred.

**2356.** 5th. If the bank knew that the note was not the property of the party offering to deposit or sell it, the taking of the note by way of collateral security for money loaned imparted no title as against the real owner.

**2357.** 6th. It is a well established principle that possession is necessary to perfect a title by pledge, and it is equally well settled that the delivery back of the possession of the thing pledged, by the act or with the consent of the pledgee, terminates his title, unless it be delivered back for a temporary purpose only or to be held by the pledgor in a new character, such as special bailee or agent. *Hooper v. Citizens' National Bank*, 47 Md. 88.

**2358.** Possession is of the essence of a pledge; and, without it, no privilege can exist as against third persons. This doctrine is in accordance with both the common and the civil law, the Code Napoleon (Art. 2076) and the civil code of Louisiana (Art. 3162). *Casey v. Cavaroc*, 96 U. S. S. Ct. 467.

**2359.** The thing pledged may be in the temporary possession of the pledgor as special bailer, without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession and has always been subject to his disposal by way of collection, sale, substitution, or exchange, no pledge or privilege exists as against third persons. *Ibid.*

**2360.** Where it was agreed that a bank should deposit bills and notes with its president and his partner, by way of pledge, to secure a loan made by a third party, and the president delivers them back to the bank officers for collection, with power to substitute other securities therefor, it is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana. *Ibid.*

**2361.** The ruling in *Casey v. Cavaroc* (*supra*, ¶ 467), as to what constitutes a valid pledge of securities, so far as third persons are con-



cerned, applies to this case. *Casey v. National Bank*, 96 U. S. S. Ct. 492.

**2362.** Defendant received money of plaintiff to insure him for becoming bail for another at plaintiff's request, and gave plaintiff his accountable receipt therefor. Defendant subsequently loaned the money and received interest for its use. *Held*, that he was liable for the interest thus received, and parol evidence was admissible to show the facts that created his liability. *Gilson v. Martin*, 49 Rowell, Vt. 474.

**2363.** Where an accommodation bill has been pledged for less than its face, and the pledgee transfers it and receives the full value, and the accommodation indorser is compelled to pay the bill, he cannot recover the surplus from the pledgee; such action can only be maintained by the pledgor. *Gregory v. Burrall*, 2 Wend. 391.

**2364.** A pledge ceases to be operative when its object is effected, and the whole beneficial interest in the security pledged then becomes absolute in the equitable owner. *Ward v. Ward*, 37 Mich. 253.

**2365.** A pledgee of stock who in good faith takes the security, for his benefit in name of an irresponsible trustee for the avowed purpose of avoiding individual liability as shareholder, incurs no liability as such. *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479.

**2366.** H. & Co. advanced money upon C. O. R. R. Co. stock in good faith, which stock was pledged to them under forged powers of transfer. The railroad company, upon the receipt of the original certificates of stock, in like good faith cancelled them, and issued new ones in the name of H. & Co. *Held*, (1) That as between H. & Co. and the railroad company [the rights of third parties not being involved] the loss must fall upon H. & Co. (2) That the fact of the stock issued to H. & Co. having been subsequently sold by them to third parties, did not affect the case, it appearing that the sale was made by H. & Co. with knowledge of the forgery. (3) That the payment of the dividends on the stock to H. & Co., by the agents of the R. R. Co., after the company was informed of the forgery, had no significance, and could not estop the company, it appearing that they were not paid by the direction of the company, but through the mistake or inadvertence of the agent, in overlooking or failing to observe the directions given by the officers of the company that "they were in litigation, and were not to be paid till ordered by the Court." (4) That the issuing of the certificates to H. & Co., by the R. R. Co., upon the faith of the forged powers of attorney sent them by H. & Co., did not create an estoppel against the company. Declarations to create an estoppel must be made by a party whose duty it is to know and state the truth, and must be relied on by one who has no other means of information, or is justified in relying upon such declarations. *Hambleton & Co. v. Central O. R. R. Co.*, 44 Md. 551.

**2367.** A. deposited with B. certain Canada railway bonds as security for a debt. On bill filed by B. for foreclosure or sale, *Held*, that B. was entitled to an order for sale only. *Jessel M. R.*, the plaintiff, is in a position of a mere pledgee at law of certain chattels, and I do not think that a person in that position has the same right of foreclosure as a mortgagee by deposit of the title deeds of land. The principle upon which the Court acts in the latter case is, that in a

regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect; and when the ground of interference is gone, by the non-payment of the debt, the Court simply removes the stop it has itself put on. Then, when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title. There will be an order for sale of the bonds by auction, but, as there seems to be a good reason why the plaintiff should not be forced to part with them, I will give him liberty to bid, he not conducting the sale. *Carter v. Wake*, 4 Chancery Division M. R., Feb. 12, 1877, c. 48.

**2368.** A bill of sale of goods, absolute in its terms, given to protect the vendee against his liability as surety for the vendor, and to secure a debt of the vendor to the vendee, with a verbal agreement that when the vendee should be relieved from his liability and the debt paid, his interest in the property cease, but with no condition of defeasance in writing, is not a mortgage. As between the parties to the absolute, formal bill of sale, it could not be shown, by proof of a parol defeasance, that the conveyance was a mortgage. *Pennock v. McCormick*, 120 Mass. 275.

**2369.** A factor cannot, generally, pledge the goods of his principal for his own liabilities, and is bound to obey the orders of his consignor as to the terms of sale. *Singer Manufacturing Co. v. Hudson*, 4 Mo. Ct. Appeals (St. Louis) 145.

**2370.** The fact that the stock of a corporation is only transferable on the books of the company, does not prevent a stockholder from validly *pledging* his stock, by merely delivering to his creditor the certificates of his stock. A transfer of the stock on the books is not necessary to perfect the pledge. *Blonin v. Liquidations of Hart & Hebert*, 30 La. 714.

**2371.** A person holding stock in a fiduciary capacity has, *prima facie*, no right to pledge it to secure a debt growing out of an independent transaction unconnected with the trust; and whoever takes it as security for such debt, does it at his own peril. *Prall v. Tilt*, 28 N. J. Ch. 479.

**2372.** Where a bailee of goods for safe keeping merely pledges the same with intent to convert the proceeds to his own use, such pledge amounts to larceny by the pledgor, and the pledgee acquires no title as against the owner, though he dealt *bona fide* with the pledgor. *Gottlieb v. Hartman*, 3 Colo. 53.

**2373.** When one delivers chattels to another as indemnity for suretyship, the law regards such delivery as a pledge merely. Nor does it alter the case in a Court of Equity that the property is transferred by absolute bill of sale, not even if the contract stipulated that the pledge shall be irredeemable. *Ibid.*

**2374.** Where the pledgee of a mortgage note, in whose hands it has been placed to secure a debt due him by the pledgor, sells the property mortgaged to secure the note for a sum less than the amount of the note, and immediately resells it for a larger sum than that of



the note, he becomes liable to the pledgor, not for the price at which the property was resold, but merely for the amount of the note. *Mrs. A. R. Richardson v. Moses Mann*, 30 La. 1060.

2375. A consignee who has made advances on cotton shipped to him, has a right of pledge on it and its proceeds, for the reimbursement of those advances; and until the debt due for those advances is paid, he is not bound to accept or pay any drafts drawn on him by the consignor against said cotton, at or about the time it was shipped, in favor of a third person who had discounted the drafts for the consignor, and thus enabled the latter to buy the cotton shipped to the consignee. *Thos. E. Helm, et al. v. Meyer, Weis & Co.*, 30 La. 943.

2376. A pledgee who was surety on a promissory note transferred the property to the payee for the purpose of discharging the debt. *Held*, that the transfer did not change the status of the property, and that the pledgor had the right to redeem, even after the maturity. *Morgan, et al. v. Dod*, 3 Colo. 551.

2377. A pledgee can sell only, and for the purpose of applying the proceeds to the extinguishment of the debt. Such sale must be at public auction, after due notice to the pledgor or owner. *Ibid*.

2378. Where the subject matter of a pledge is divisible, the pledgee has no right to sell more than is necessary to satisfy the debt; and if he does so, is responsible to the pledgor for the damage he may sustain. *Fitzgerald v. Blocher*, 32 Ark. 742.

3379. The acceptance by the pledgor of the surplus arising from an illegal sale of the articles pledged, is no waiver of his rights to damages resulting from the sale. *Ibid*.

2380. Where the pledgor, at the time of making the pledge, waives notice of sale, he cannot, after the sale of the pledged property, complain of a want of notice. *Ibid*.

2381. Where a pledgee of scrip sells more than is necessary to satisfy his debt, and pays the surplus to the pledgor, who buys other scrip to replace what has been sold, the measure of damages is the difference between the price for which the excess sold and that paid by the pledgor to replace it. *Ibid*.

2382. Where one deposits United States "five twenty" bonds for safe keeping with a banking institution, and the cashier of such institution pledges them, the pledgee, acting in good faith, takes a good title; and the recovery of the bonds through the fraud and bad faith of such cashier does not divert the title out of the pledgee and revert it to the depositor. *Ringling v. Kohn, et al.*, 4 Mo. Appeal Reports (St. Louis) 59.

2383. There can be no valid pledge of a mortgage, or vendor's privilege, by mere agreement of parties to that effect, unaccompanied by an actual or symbolical delivery of possession. *Sevin & Gourdain, in Liquidation v. Theogene Caillonet*, 30 La. 528.

2384. The assignee of a note, held as collateral security for a debt due from the assignor, has no power to deal with it, except to accomplish the purpose for which he holds it. He cannot bind the assignor by a contract with the maker for forbearance. His liability to perform such contract is dependent upon the will of the assignor, who may pay his debt and take back the collateral at any time; and, therefore, a promise of the maker to pay a larger interest, in consideration of such

forbearance, is without consideration and not binding upon him. *Key v. Fielding*, 32 Ark. 56.

**2385.** Such assignee is a trustee for his assignor, and all profit, benefit, or advantage made by him, by his dealing with the note, belongs to the assignor, and not to himself, and must be applied to the satisfaction of the assignor's debt, and the excess, if any, paid to the assignor. *Ibid.*

**2386.** One to whom a promissory note is pledged as collateral security for a debt, unless specially authorized, cannot sell the same on default, but is bound to collect it at maturity, and apply the proceeds to the debt. *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 584.

**2387.** Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. *Duncan v. Brennan*, 83 N. Y. 487.

**2388.** Nor can it be so held although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general account cannot be invoked. *Duncan v. Brennan*, 83 N. Y. 487.

**2389.** Where a bond and mortgage are assigned as collateral for a loan, with an agreement upon the part of the lender that he will, on payment of the mortgage pay to the borrower the excess of the principal over and above the amount of the loan, and without any agreement as to a foreclosure, and where the mortgage is foreclosed by the lender without making the borrower a party thereto, or to any other proceedings to foreclose him, and the mortgaged premises are bid in by the lender, the equitable interest which the borrower retained in the mortgage, attaches to the land, and he is entitled to the surplus, in case of a sale thereof by the lender for more than the amount of his claim. *Dalton v. Smith*, 86 N. Y. 176.

**2390.** The assignment merely of an expected surplus in property pledged to secure a usurious loan does not entitle the assignee to avoid the lien or to claim the property free therefrom. *Dalton v. Smith*, 86 N. Y. 176.

## POSSESSION.

**2391.** Possession by a man or his tenant is notice of the title, equitable as well as legal, under which he claims the property. *Wanner v. Sisson*, 29 N. J. 141.

**2392.** No length of constructive possession will ripen a defective title to land into a good one; the possession must be actual and continuous. Where there is no actual occupation of land shown, the law carries the possession to the real title. A possession of land under color of title must be taken by a man himself, his servants or tenants, and by him or them continued for seven years together. *Therefore*, where in an action to recover land it appeared that the plaintiff under color of title had made occasional entries upon the land at long intervals, for the purpose at one time of cutting timber, at another of making bricks, etc. *Held*, that the plaintiff was not entitled to recover. *Williams v. Wallace*, 78 N. C. 354.



**2393.** Where A. enters into possession of land, the property of B.'s wife, under a deed from B. alone, the possession of A. is in law the possession of the wife, and enures to her benefit. *Davis v. M. Arthur*, 78 N. C. 357.

**2394.** Possession of a note, bond or bill, unattended by circumstances which, in a reasonable mind, ought to excite suspicion or distrust, or put a party on inquiry, is *prima facie* evidence of ownership in the holder, and a purchaser from such a holder will be protected until his purchase is assailed by one who can establish a legal title to the instrument. *Garvin v. Wiswell*, 83 Ill. 215.

### POWER.

**2395.** A power committed to two or more persons, unless it otherwise appear from the instrument by which it is delegated, is properly executed only by the joint act of all who have accepted the trust. *Giddings v. Butler*, 47 Texas, 535.

**2396.** If a grantor has power to sell, and sells, his act will pass title, whether he refers to the power or not. His act would pass his own and the interest of his principal. *Hough v. Hill*, 47 Texas, 148.

**2397.** Where a party alleges that a deed executed by his attorney, under a power to convey is invalid for matters not apparent on its face, the burden of proving them is on such party. *Clements v. Machebocuf, et al.*, (2 Otto,) U. S. S. Ct. Rpts. 92, 418.

**2398.** A deed of conveyance executed in his own name by one having a special power of attorney, "for me and in my name, place and stead to grant" etc., and this without referring to or reciting the warrant in the deed, conveys no title. *Bassett v. Hawk*, 114 Penn. 502.

**2399.** An attorney who makes a surrender ought to make it in the usual form, as by the rod, etc., according to the custom of the manor, and he ought to make it in the name of the copyholder, not in his own name. *Kennedy v. Skeer*, 3 Watts. 95; *Hefferman v. Adams*, 7 Watts. 116; *Shokeeker v. Farmers' Bank*, 8 Watts. 191.

**2400.** A special power of attorney can be executed in no other manner than that prescribed in the warrant itself. *Bassett v. Hawk*, 114 Penn. 502.

### PREFERENCE.

**2401.** A sale of property by an insolvent debtor, made in good faith, to pay a particular creditor of his, to the exclusion of others, without any intention to defraud, but simply to prefer one creditor to another, although the purchaser may have had full knowledge of such intent on the part of the vendor, is a valid sale. *Avery v. Eastes*, 18 Kansas, 505.

**2402.** A bond given by a debtor in failing circumstances, covering all his property for the benefit of preferred creditors, is contrary to the policy of the statute against fraudulent insolvency. *Comly v. Waters, et al.*, 2 Del. 72.

## PRESUMPTIONS.

**2403.** In the absence of proof to the contrary, it will be presumed that notaries of other States have no greater powers than are possessed by those of this State. *McLear & Kendall v. Succession of Hunsicker*, 29 La. 539.

**2404.** Presumption is that drawer of draft is solvent; also, that common law rule as to charging drawer prevailing here prevails in another State. *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320.

**2405.** In respect to a forged instrument there is no presumption of delivery at its date or at any particular time. *Rem. Paper Co. v. O'Dougherty*, 81 N. Y. 424.

**2406.** Where a purchaser has notice of the facts upon which an adverse claim depends, he is deemed to have notice of the consequences of those facts. *Cuyler v. Ferrill*, 1 Abbott, U. S. 169.

**2407.** Mortgage presumed paid after lapse of twenty years. *Hughes v. Edwards*, 9 Wheat. U. S. 489.

**2408.** No presumption of payment can arise from lapse of time against a mortgagee or his assigns in possession. *Brobst v. Brock*, 10 Wall. U. S. 509.

**2409.** The presumption is that letters, mailed to a person directed to him at his place of residence, were received by him. *Oregon S. S. Co. v. Otis*, 100 N. Y. 446.

**2410.** A wife's separate and personal possession of specific articles of personal property draws after it the presumption of ownership. *Whiton v. Snyder*, 88 N. Y. 299.

## PRINCIPAL AND AGENT.

**2411.** S. being employed by the respondent to carry on his business, credited the respondent in an account with the appellants with the sum of 5,800 taels, which he falsely represented to have been advanced in the ordinary course of business on certain goods intended for shipment. He then drew a bill in the name of the respondent's firm on the appellants for the balance of account, and having received the proceeds of such bill, including the said 5,800 taels, appropriated them to his own use. On a special case submitting whether the respondent was liable to the appellants in the said sum with interest from date of receipt by S., *Held*, that the proceeds of the bill having been received as aforesaid by S., acting throughout within the scope of his authority, belonging to the respondent, and that he having thus been paid 5,800 taels without consideration, the appellants were entitled to recover back the same. *Barwick v. The English Joint Stock Bank*, Law Rep. 2 Ex. 259, and *Mackay v. The Commercial Bank of New Brunswick*, Law Rep. 5 P. C. 412; approved. *Swive v. Francis*, 41 Canada Law Rep. 3 P. C. 106.

**2412.** Where a secret gratuity is given to an agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on



behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interest of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is void at his option. *Smith v. Sorby*, 3 App. Cases, Eng. (41-42 Vic.) 552.

**2413.** One purchasing goods for another makes himself personally liable, if he contracts in his own name without disclosing his principal; and this, although the seller supposes the purchaser is acting as agent; it is not sufficient to clear the agent from liability that the seller has the means of ascertaining the name of the principal; he must have actual knowledge. *Cobb v. Knapp*, 71 N. Y. 348.

**2414.** Also, *held*, that a subsequent disclosure of the principals by defendant, and the commencement of an action against them by plaintiff was not conclusive of an election to hold them only responsible; that the fact of commencing such action, and the statements in the complaint, were proper to be considered by the jury on the question of knowledge as to the principals, but did not operate as a legal discharge. *Ibid.*

**2415.** Where agents, without express authority, assume to act for their principals, the latter will be bound, if, with knowledge of such assumptions, they acquiesce in and receive the benefit of such acts; and from a continuous course of such dealings, the public will be at liberty to deal with the agents as having original authority to perform the acts, and the principals will be estopped to try it. *Coöperative Association v. McConnico*, 53 Miss. 233.

**2416.** Where, at the time of an agreement for a loan to be secured by bond and mortgage, at the request of the borrower, and upon his agreement to pay interest from that time, the money was left in the hands of an agent of the lender until the borrower could perfect the security, *held*, that the agreement and the retention of the interest in pursuance thereof did not constitute usury. *Bevier v. Covell*, 87 N. Y. 50.

**2417.** Also, *held*, that the fact was immaterial that the agent, without authority from his principal, used the money on his own account. *Bevier v. Covell*, 87 N. Y. 50.

**2418.** Ratification by a principal of his agent's acts is only binding when made on full knowledge of the facts as they actually exist, not merely as the agent believed them to exist. *Bank of Owensboro' v. Western Bank*, 13 Bush, Ky. 526.

**2419.** A principal is liable, as a general rule, for such wrong of his agent as is committed in the course of his employment and for the benefit of the principal; and this, although no express command or privity is proven. *F. Svigs. Instn. v. Nat. Bank*, 80 N. Y. 162. The fact that an agent, intrusted with money of his principal to invest, exacts a bonus for himself, without the knowledge or assent of his principal, as a condition of making a loan, does not establish usury. The principal is not liable for such an authorized act of the agent, in the absence of proof that he received a portion of the bonus or in some form reaped a benefit or advantage from the same. *Van Wyck v. Watters*, 81 N. Y. 352.

**2420.** An agent employed to drive cattle, to whom the possession

thereof is intrusted by the principal, cannot deliver such possession to a subagent appointed by himself. *Underwood v. Birdsell*, 6 Mont. 142.

**2421.** When principal not chargeable with notice of fact which came to knowledge of agent while not engaged in business of agency. *A. S. Bank v. Savery*, 82 N. Y. 291.

**2422.** Where an insurance company directs its agent not to deliver policies until the whole premiums are paid, "as the same will stand charged to their account until the premiums are received" and the agent did, nevertheless, deliver a policy giving a credit to the insurer and waiving a cash payment, *Held*, that the company, it being a stock company, was bound. *Miller v. Life Ins. Co.*, 12 Wall. U. S. 285.

**2423.** Where an instrument, executed by an agent, shows on its face the names of the contracting parties, the agent may sign his own name first and add to it, "agent for his principal," or he may sign the name of his principal first, and add, by himself as agent. *Smith v. Morse*, 9 Wall. U. S. 77.

**2424.** It seems that where, by the agreement, the agent is to apply the proceeds of sales to the payment of drafts so drawn, as they mature, he may not hold goods as security against drafts which he can pay with funds of his principal in his hands applicable to that purpose, and the principal, after paying all drafts outstanding, save an amount no greater than the proceeds of sales in the agent's hands, may claim and take possession of the goods. *Nagle v. McFeeters*, 97 N. Y. 196.

**2425.** It seems that where, by the agreement, the agent is to apply the proceeds of sales to the payment of drafts so drawn, as they mature, he may not hold goods as security against drafts which he can pay with funds of his principal in his hands applicable to that purpose, and the principal, after paying all drafts outstanding, save an amount no greater than the proceeds of sales in the agent's hands, may claim and take possession of the goods. *Nagle v. McFeeters*, 97 N. Y. 196.

## PRINCIPAL AND SURETY.

**2426.** Where the real estate of the surety has been levied upon and sold at sheriff's sale, on an execution issued upon a judgment rendered against the principal and surety in a delivery bond, in an action thereon for a breach of its conditions, the latter may, in an action against the former, recover as for money paid to his use. *Collins v. Paris*, 57 Ind. 151.

**2427.** A bond executed in *blank* by H. and sureties to enable him to raise \$300, by loan from B., was filled up and delivered, without their knowledge, to C. and N. for \$354.48, in payment of a debt,—*Held*, fraudulent and void as to the sureties. A bond executed in *blank*, on a specific purpose, cannot be otherwise filled up, without authority of the obligors. Such authority must be proved affirmatively, to sustain the bond. *Hastings, et al. v. Clendaniel, et al.*, 2 Del. 165.



**2428.** A cashier of a bank, by virtue of his office, is not authorized to release a surety upon a note or bill belonging to the bank without payment. *Merchants' Bank v. Rudolf*, 5 Neb. 527.

**2429.** The fact that a bank holds other securities for the payment of a note, to which it might resort, is no ground for the release of surety. Statements made by a cashier at casual interviews, away from the bank, as to payments having been made upon its securities, are not binding upon the bank. *Ibid.*

**2430.** If the cashier, on inquiry by a surety who is not an officer of the bank, state that the note upon which he is surety has been paid by the principal, the bank is estopped from denying the truth of such statement, when to do so would entail a loss upon the surety, which he would have guarded against had it not been made. But this rule is not applicable where the surety is one of the directors of the bank, for he has the means of knowledge of the true condition of its affairs, and is conclusively presumed to know whether payment has been made or not. *Ibid.*

**2431.** And where a firm is surety, and one of its members is also a member of the board of directors of the bank, all the members of such firm are affected with the notice, which the one who is director is presumed to have. *Ibid.*

**2432.** A release of the principal debtor, against whom, with the surety, a joint judgment has been obtained, operates as a release of the surety. *Anthony v. Capel*, 53 Miss. 350.

**2433.** An agreement between the holder and principal maker of a note that the latter may retain the sum due for a definite time, upon his promise to pay usurious interest, will discharge a surety on said note not consenting to such contract of forbearance, but in the absence of such a contract, payment of the stipulated interest will not discharge the surety, even though, because of such payment, the creditor continues his indulgence to the debtor. The agreement to forbear for a definite period, in consideration of the payment of usurious interest, releases the non-consenting surety. *Brown v. Prophit*, 53 Miss. 649.

**2434.** In an action upon an administration bond, under R. S., ch. 72, § 9, a judgment against the administrator, in favor of the creditor of the intestate, for whose benefit this suit is brought, does not estop the sureties from showing that, prior to the commencement of the action in which judgment was recovered, the administrator's authority had become extinguished. When the plaintiff relies upon such judgment, with a demand and refusal to pay, or to show property to pay the execution, and a return of *nulla bona* thereon, proof that the administrator's authority had become extinguished before the creditor brought his original suit will defeat the action upon the bond against the sureties. *Bourne v. Todd*, 63 Me. 427.

**2435.** A surety cannot be held on a bond which he only signed upon a condition that was not performed. A bond does not take effect from the signing, but only from delivery or filing. A bond dated and made to take effect upon a week day will protect an obligee who had no notice that it was actually signed on Sunday. *Hall, et al. v. Parker, et al.*, 37 Mich. 590.

**2436.** The execution of a deed of trust by a principal debtor, whereby property not subject to execution was made liable for its pay-

ment, is a good consideration for a promise to extend the time for payment of the note, and such an agreement will discharge the surety. *Semple, et al. v. Atkinson, et al.*, 64 Mo. 504; *Smarr v. Schnitter*, 38 Mo. 478.

**2437.** P. and K., a firm of which defendant was a partner, executed to a State bank a written undertaking to be "responsible for the payment of any sum not to exceed" \$5,000, which W. might require of said bank "for legitimate business purposes." In an action upon the guaranty, it appeared that loans were made which were renewed from time to time; that defendant knew of, and assented, in writing and orally, to the renewals. *Held*, that he was concluded thereby from claiming that the sureties were discharged by extension of time. *City Nat'l Bank v. Phelps*, 86 N. Y. 484.

**2438.** The U. S. S. Co., a corporation organized in this State, of which one W. was one of the principal promoters and organizers, and a large stockholder, proposed to the citizens on Sandusky, Ohio, that it would erect a rolling mill at that place, if they would donate the real estate and loan to it \$150,000 upon its bonds, secured by the guaranty of W. and other stockholders. The proposition was accepted and complied with, and W., with the other designated stockholders, executed a joint guaranty of the payment of the bonds. The company and the guarantors, including W., thereafter became insolvent, and the latter executed a general assignment for the benefit of creditors, and subsequently died before the bonds fell due. In an action brought to compel an accounting on the part of the assignees of W., and a distribution of the funds in their hands, *held*, that the liability upon the guaranty was not extinguished by his death; that the guarantors did not act as mere sureties, but secured an individual benefit, and were under a moral obligation to pay; and so that there was a just foundation for a court of equity to intervene and save the obligation of the guaranty, and, therefore, that the holders of the bonds were entitled to share *pro rata* with the other creditors in the assigned estate. *Richardson v. Draper*, 87 N. Y. 337.

**2439.** The death of a joint obligor only discharges his obligation in a case where it appears that he was a mere surety, who received no benefit whatever from the joint obligation. *Richardson v. Draper*, 87 N. Y. 337.

**2440.** It seems, that in an action against a principal and surety, insolvency of the plaintiff is a sufficient ground in equity for the allowance of a set-off existing in favor of the principal against the plaintiff; this equitable right is strengthened where the principal is also insolvent. *Coffin v. McLean*, 80 N. Y. 560. The liability of a surety is limited to the express terms of the contract; his obligation, so far as warranted by the terms employed, should be construed strictly and favorably to him. *Ward v. Stahl*, 81 N. Y. 406.

**2441.** Bonds taken by an officer in the course of official duty, to and for the benefit of another, are not open to the objections to bonds taken by an officer, to and for himself, which must more closely follow the statutory requirement; in the former case the substance is looked for more than the form, although it be a surety that is to be held. *Gerould v. Wilson*, 81 N. Y. 573.

**2442.** Where the engagement of a surety is for the future, he can-



not be made liable for the past, as to which he has not covenanted. *Thomson v. MacGregor*, 81 N. Y. 592.

**2443.** Q. having been appointed receiver of an insolvent savings bank executed his bond with O'D. as surety. Q. entered upon his duties, but subsequently by leave of the court resigned, and a new receiver was appointed. An order of Special Term was made settling the accounts of Q., as receiver, which contained a clause authorizing O'D. to appeal on stipulating to be bound by the decision thereon. O'D. appealed to the General Term; making the required stipulation, which was accepted by the opposite party. The appeal was heard without objection to the right of O'D. to appeal; the order appealed from was affirmed, with a direction that O'D. pay to the new receiver the amount of the bond. *Held*, that O'D. was entitled to appeal to this court. *In re Rec'rship of Guardn. Savings Instn.*, 78 N. Y. 408.

**2444.** It seems that one of several original debtors may so contract with the others for their assumption and payment of the common debt as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor. *Palmer v. Purdy*, 83 N. Y. 144.

**2445.** Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety. *Palmer v. Purdy*, 83 N. Y. 144.

**2446.** Plaintiff leased certain premises to a firm. Two of the partners subsequently left the firm and the premises, the parties remaining having by valid contract assumed and agreed to pay the rent thereafter accruing. In an action brought against the original members of the firm to recover such rent, it appeared that plaintiff was informed that the two partners were going out, and that the others were to remain and would pay the rent; but it did not appear that he was advised of any agreement by which those remaining were bound to pay the rent, or by which the legal relation of the retiring members of the firm to the common liability was changed. *Held*, that the evidence failed to establish the right of the retiring partners to be treated as sureties. *Palmer v. Purdy*, 83 N. Y. 144.

**2447.** S. and O., the defendants who continued the business, gave their notes to plaintiff for rent in arrears. These were accepted by him upon the express stipulation that the liability of G. and P., the other defendants, should not thereby be released, and with the reservation of his rights and remedies against them. *Held*, that the arrangement was not such an extension as discharged G. and P., even if the rights of sureties were accorded to them. *Palmer v. Purdy*, 83 N. Y. 144.

**2448.** Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (§ 338), containing among other things this provision, that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General Term in September, 1865, and in October, 1865, W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on

the undertaking given on appeal to the General Term, *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court. *Church v. Simmons*, 83 N. Y. 261.

**2449.** It seems that if after judgment of affirmance the defendant continued in possession by permission of the plaintiff under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant. *Church v. Simmons*, 83 N. Y. 261.

**2450.** It seems also that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts. *Church v. Simmons*, 83 N. Y. 261.

**2451.** It seems also that the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking on the second appeal. *Church v. Simmons*, 83 N. Y. 261.

**2452.** Mere indulgence by a creditor of the principal debtor will not discharge a surety. To work such a discharge there must be an agreement for an extension made without the consent of the surety, which precludes the creditor meanwhile from enforcing the debt against the principal. *Powers v. Silberstein*, 108 N. Y. 169.

### PRIVILEGE.

**2453.** If the proceeds of the movables and unmortgaged property of a succession do not suffice to pay off its privileged debts, those debts must be first preferred for payment to the proceeds of its property incumbered by the *youngest* mortgage. The vendor's privilege is only operative as to third persons from the moment of its registry. The vendor's privilege will not take rank over a mortgage recorded before its own registry, unless its own registry was made on the day of the sale. To maintain his privilege on property sold by him, as to third persons, the vendor must record the sale.

**2454.** Seizure of property under the execution of a valid judgment, gives a lien on the property, superior to any privilege recorded against it subsequent to the seizure. *O'Hara v. Mrs. E. Booth and Connell*, 29 La. 817.

### PROFITS.

**2455.** Probable profits are not a proper basis upon which to estimate damages, and therefore, under the testimony as reported in this case, nominal damages only can be recovered. *Winslow v. Lane*, 63 Me. 161.

**2456.** Property purchased by a wife on the credit of her separate estate, or of her earnings in its management, is not liable for the debts of the husband. *Silvens v. Porter*, 74 Penn. St. 448.



## PROMISE.

2457. The holders of a note demanded payment from the endorser, who replied that he "had not expected to have it to pay, and that it was impossible to pay it at present." *Held*, insufficient as a promise to pay. *Cromer v. Platt*, 37 Mich. 132.

2458. As long as the creditor can maintain an action on the original promise, a new promise, without additional consideration, will not support an action. *Ogden, Etc. v. Redd*, 13 Bush, Ky. 581.

2459. A promise made to a debtor, for a valuable consideration, to pay his debt to a third person, is not a promise to answer for the debt of another person, within the statute of frauds, which applies only to promises made to a creditor; and such promise made to the debtor need not be in writing. *Centre v. McQuesten*, 18 Kansas, 476.

2460. It seems a promise to pay a debt of another antecedently contracted, where the primary debt still subsists, is original and so valid within the statute of frauds, although not in writing, when it is founded on a new consideration moving to the promisor and beneficial to him, and when by the promise he comes under an independent duty of paying, irrespective of the liability of the principal debtor. *White v. Rintoul*, 108 N. Y. 222.

2461. If a man promises one to see him harmless should he become surety for a third person, or should he do anything else, this is a mere arrangement between promisor and promisee. The promise is to pay what the person to whom it is made may become liable for—not "another's" debt, but his. Therefore, it is not within the statute of frauds, and is valid though oral. *Aldrich v. Ames*, 9 Gray, Mass. 76; *Dunn v. West*, 5 B. Monr. Ky. 376; *Lucas v. Chamberlin*, 8 B. Monr. Ky. 276; *Perley v. Spring*, 12 Mass. 297; *Holmes v. Knights*, 10 N. H. 175; *Blount v. Hawkins*, 19 Ala. 10; *Perkins v. Littlefield*, 5 Allen, Mass. 370.

## PROMISSORY NOTES.

2462. In an action against an indorser of a promissory note, the defendant testified that he said to the plaintiff's agent that he doubted if the maker would pay the note; that he would like to arrange it by giving a new note, making himself promisor; if he would make a new note, he would sign it; if he would send up the old note, he would waive demand and notice upon the back of it; and on cross-examination he testified that he did not want to have the note protested; that he wanted to save the expense of demand and notice, and though, if the note was protested, he would have to pay it immediately, and that was the reason why he offered to give a new note. *Held*, that a ruling that, as matter of law, on this evidence the defendant waived demand and notice was incorrect. *Batt v. Chase*, 122 Mass. 262.

2463. A promissory note made by one member of the firm, in its name, can be enforced against the partnership by the holder thereof, if he has no actual knowledge, suspicion or cause of suspicion, of any

fraud upon the partnership in the making of the note. *Blodgett v. Weed*, 119 Mass. 215.

**2464.** Possession of a promissory note is *prima facie* evidence that the bank is the owner thereof, and in absence of proof to the contrary is conclusive; and there is no denial of the validity of the note, so it makes no difference to the defendant who holds the note, as long as he owes it to some one. *Fletcher v. Fletcher*, 29 Vt. 98.

**2465.** Action. A suit will lie against the administrator of a deceased maker of a promissory note, made jointly by two, during the life of the other maker. *Thompson v. Johnson*, 40 N. J. Law, 220.

**2466.** A promissory note payable in bank, indorsed for value, before maturity, in the usual course of business, to a *bona fide* holder, is not subject in his hands to the same defences as a promissory note payable in bank. *Bremmerman v. Jennings*, 60 Ind. 175.

**2467.** Upon demand and refusal of payment of a promissory note on the last day of grace, a right of action accrues at once to the holder, and the Statute of Limitations begins to run from the date; but if there is no demand, the cause of action does not accrue until the succeeding day. *Holland v. Clarke*, 32 Ark. 697.

**2468.** A promissory note of a turnpike company is not void because made before it has filed a copy of its by-laws, as required by statute with the county recorder. *Forbes v. San Rafael T. Co.*, 50 Cal. 340.

**2469.** The makers of a promissory note cannot annul a judgment obtained against them on said note by the administrator of a succession, on the ground that the note did not belong to the succession, or on the ground that the administrator was not qualified to act as such. *Maraist v. Guilbeau*, 30 La. 1087.

**2470.** The maker of a promissory note, indorsed in blank, and acquired by the holder before its maturity, cannot resist the payment of the note on the ground that the holder is not the real owner, unless he alleges and shows that he has good defences or claims against the real owner. An agent, in whose hands a note has been placed for collection, may sue on it in his own name. *George M. Klein v. Mrs. Buckner, et al.*, 30 La. 680.

**2471.** Parol evidence of the indorsement of a promissory note, without the production of the note, held inadmissible, though not offered in order to charge the indorser. *De Pusey v. Du Pont, et al.*, 1 Del. Chancery, 77.

**2472.** Before the maker of a lost note, or mislaid negotiable note, which was transferred before its maturity, can be made to pay it, he is entitled to be indemnified against its subsequent appearance. *Nalle & Cammack v. Conrad*, 30 La. 503.

**2473.** Negotiable securities stolen, and afterwards sold by the thief, the owner thereof may follow and claim the proceeds in the hands of the felonious taker, or of his assignee, with notice, and this right continues and attaches to any securities or property in which the proceeds are invested and identified, and the rights of a *bona fide* purchaser do not intervene. The law will raise a trust *in invitum* out of the transaction, in order that the substituted property may be subjected to the purposes of indemnity and recompense. *Newton v. Porter*, 69 N. Y. 133.



2474. The debtor of a bank, of which A. was cashier, transferred a negotiable note, in payment of his indebtedness, to A. by special indorsement, and thereupon the bank, to enable A. to bring suit thereon, assigned its interest in the note to him. *Held*, that A. might maintain an action on the note in his own name notwithstanding he may be accountable to the bank for the proceeds when collected. *White, Bonner & Wright v. Stanley*, 29 Ohio, 433.

2475. Such indorsement and transfer having been made before maturity of the note, the same in the hands of A. is not subject to any defence of which neither he nor the bank had notice at the date of the transfer. *Ibid*.

2476. The signer of a promissory note, which reads that "we promise *in solido*," etc., will be held bound as a solidary debtor on such note, unless he proves that he has been legally released from his obligation. *Wm. H. Boullt v. Jerome Sarpy, et al.* 30 La. 494.

2477. To defeat the title of an innocent purchaser to a note, on the ground of inadequacy of the price paid for it the inadequacy must be such under the circumstances as to impeach the good faith of the purchase. *Rooker v. Rooker*, 29 Ohio, 1.

2478. When the purchaser of such note receives it in part payment, of property sold, his title to the note is not affected by the fact that he retains the title and possession of the property sold as security for the unpaid purchase money. *Ibid*.

2479. Where one of several accommodation makers of a joint and several promissory note paid the same, and subsequently transferred and delivered it for a valuable consideration to a third person, *held*, that, although the note, as an obligation, was extinguished by the payment, yet it remained in the hands of the maker who paid it, the evidence of his cosureties; and that the delivery raised a legal presumption of an intent to pass, and did pass this right to the transferee. *Dillenbeck v. Dygert*, 97 N. Y. 303.

2480. A statement in promissory note that it was given for money loaned is not conclusive; it is open to either party to show the actual consideration. *Miller v. McKenzie*, 95 N. S. 575.

2481. A promissory note made by D. payable to his order at defendant's bank was for a valuable consideration indorsed by him and delivered to B., at whose request it was discounted by defendant upon pledge as collateral of a \$500 government bond belonging to plaintiff. At about the maturity of the note defendant, without the consent or knowledge of B., or plaintiff, upon receipt of a new note, executed and indorsed by D. for the same amount which contained the statement "U. S. bond \$500 collateral security" and upon payment of the interest, canceled the first note and surrendered it to D. Before maturity of the second note D. absconded; it not having been paid when due, defendant, without notice to A. or plaintiff, sold the bond in open market, appropriating sufficient of the proceeds to pay the note. In action for the conversion of the bond, *held*, that defendant was liable; that before retaining the bond upon a new contract it should have required the consent of B. *Burnap v. Nat. Bank*, 96 N. Y. 125.

2482. L., plaintiff's intestate, executed, for the accommodation of E., a note for \$2,180, payable to the order of the latter, who indorsed and negotiated it, receiving the proceeds. E. gave to L., in exchange,

his own note for the same amount. Not being able to meet the note so executed by L. at maturity, E., in pursuance of an agreement between them, paid to L. \$1,180, and transferred to him a note made and indorsed by defendants, for \$1,000 not then due, whereupon L. delivered up to E. his note and paid the accommodation note when due, which was taken up and canceled. E. had received before the transfer \$120 to apply on the \$1,000 note, of which L. had no notice or knowledge when he received it. In an action upon the note, *held*, that L. was a *bona fide* purchaser for value without notice, and so was entitled to be protected against the equities of the defendants, and the payment was no defence. *Ward v. Howard*, 88 N. Y. 74.

**2483.** A promissory note dated July 21, 1874, was by its terms made "payable on demand after date" at a bank, with interest "after maturity." The note was indorsed and transferred by the payee on the day of its date. It was presented for payment on the first and fourth days of February, 1878, payment demanded and refused, and on the fourth it was protested and the indorser notified. In an action upon the note, *held*, that it was the intent of the parties that the note should be presented for payment, if not immediately, at least within a very short time; and that the delay in this case was such as to dishonor the note, and the indorser was discharged. *Crim v. Starkweather*, 88 N. Y. 339.

**2484.** Where the transfer of a note is upon the last day of grace it is before maturity; the maker has the whole of that day within which to pay. *Cont'l Nat. Bank v. Townsend*, 87 N. Y. 8.

**2485.** In a suit at law, by the payee of a promissory note or his representative, against the maker, evidence is inadmissible to show that the note was not intended to be a promissory note, but was given as a memorandum not to be enforced against the maker. *Burnes v. Scott*, 117 U. S. 582.

**2486.** The making of a champertous, and therefore under the law of the State void and illegal, contract for the prosecution of a suit to collect a promissory note, cannot be set up in bar of a recovery on the note. *Burnes v. Scott*, 117 U. S. 582.

**2487.** That the maker of a promissory note had, contrary to the real fact, confessed, in a pending garnishment proceeding, the court, *held* that such confession should be disregarded in determining case, except as an evidence of evil intent, as to the genuineness of the note designed to avoid its payment. *Ibid.*

**2488.** A municipal corporation has no power to invest its obligations with the character and incidents of commercial paper, so as to render them unassailable by defences to which they would be subject in the hands of the immediate parties, unless such power is conferred by legislative authority, either express or clearly implied. *Knapp v. Mayor and C. of Hoboken*, 39 N. J. 394.

**2489.** In the case of bills of exchange, promissory notes and other commercial contracts a month is always a calendar month. A note, payable six months after the 30th of May, is due just six calendar months and three days thereafter, the days of grace being included, bringing it to maturity consequently on the 3d of December succeeding. Until that day the indorsers of such paper have not broken their contract by non-payment. *Bank of Tennessee v. Alexander*,



*Officer, et al.*, 59 Tenn. 173 (3 Baxter). The demand must be made on the third day of grace, on the second if the third be a holiday. *Ibid.*

**2490.** The holder of negotiable paper, taking it for good consideration in the usual course of business, without knowledge of facts impeaching its validity, holds it by a good title. It is not enough to defeat his recovery to show that he took it under circumstances that might tend to excite suspicion. *Farrell v. Lovett*, 68 Me. 326.

**2491.** In an action against the maker by an indorser of a negotiable promissory note, who purchased the same for a valuable consideration before maturity, and without notice of any fraud or infirmity as between the original parties, the defendant is not liable where it is shown: (1) That at the time of signing and delivering the note he was induced by fraudulent representations as to the character of the paper to believe that he was signing and delivering an instrument other than a promissory note; (2) That his ignorance of the true character of the paper was not attributable in whole or in part to his own negligence in the premises. *DeCamp v. Hamma*, 29 Ohio, 467.

**2492.** A negotiable promissory note, given for a patent right, without the words "given for a patent right" inserted therein, as required by No. 68, s. 2, of the Acts of 1872, is good in the hands of a *bona fide* holder for value who takes it before maturity, and without notice of what it was given for. *Pender v. Kelley*, 48 Vt. 27.

**2493.** In an action by payee of a joint and several promissory note, payable on demand against a maker, a plea that defendant had signed as accommodation maker, with the following agreement written on note, "This note is to be paid off within three years from date," and that the plaintiff had made no demand, and the note had not been paid within three years, is a bad plea. *Lawrence v. Walmsley*, CIX. 797; 12 C. B. N. S. 797 (Eng. Com. Law).

**2494.** Where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper. *Held*, that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a material alteration as rendered the note void in the hands of a *bona fide* holder. *Gerrish v. Glines*, 56 N. H. 9.

**2495.** An agreement by the indorsee of a promissory note for a definite extension of the time of payment, in consideration of an agreement by the maker to pay a greater rate of interest than that provided for in the note, is binding upon them, and if made without the consent of the indorser, will release him from all liability thereon. *Kittle v. Wilson*, 7 Neb. 180.

**2496.** This defence is a legal one, and should be made by the indorser in the action against him on the note; but if he neglects to do so, and suffer judgment to go against him, he cannot afterwards make it available as a ground for enjoining the enforcement of such judgment. *Ibid.*

**2497.** It is not necessary that any United States internal revenue stamps should be affixed to a note, or a mortgage, in order to make it competent evidence in our State courts. *Pargoud v. Richardson*, 30 La. 1286.

**2498.** A promissory note, drawn for a sum certain and made pay-

able to any person, "or order," "or assigns," "or bearer," is negotiable; but if it is payable to a certain person, without words making it payable "to order," "or assigns," "or bearer," it is not a negotiable instrument. *Hosford v. Stone*, 6 Neb. 380.

2499. Any words in a promissory note, from which it appears that the person making it intended it to be negotiable, will give it a transferable quality; but the words "negotiable and payable without defalcation or discount," do not of themselves make an instrument, otherwise non-negotiable, negotiable. *Ibid*.

2500. Where a note, though negotiable, is payable to order, and undorsed, and is accidentally destroyed by fire while in the possession of the payee, the payee can maintain an action on such lost instrument without first tendering or giving a bond of indemnity. *Blandin, Adm'r v. Wade*, 20 Kansas, 251.

2501. In a case where a note, framed on a printed blank, was complete at the time it left the hands of the party sought to be charged, but was so printed as to give an apparent authority to fill a blank space, occupying the same position relative to the body of the note that an interest clause usually does, and the space left finished ample room for inserting such clause, and the space was not filled in a way to attract observation, the Court strongly inclined to the opinion that the defendant would be bound to an innocent hold. *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

2502. If the principal in a promissory note borrows money with which to pay the same, and, on paying the sum due thereon the note is delivered to him and the party advancing the money, and it is afterwards arranged between them that the note shall be indorsed by the payee to the party making the loan, the surety not being present or consenting thereto, this in law will be a payment of the note, as to the surety. *Dare v. Humphrey, et al.*, 29 Ill. 452.

2503. Promissory note, given by a vendee for the price of a thing which the vendor assumed to sell, but which never had an existence, are utterly without consideration, and cannot be enforced by the vendor, or by any one who has acquired them after their maturity. *Cummings v. Saux*, 30 La. 207.

2504. Giving a note for an antecedent debt is not a payment of it, unless the note be received under an express agreement, or under circumstances from which an agreement may be fairly implied to treat it as a payment, or unless payment in fact result from it. *May & Sloan v. Gamble*, 14 Fla. 467.

2505. An agreement by a debtor and creditor that the creditor will, at a future day, accept new notes and securities in lieu of those held, giving additional time of payment of the indebtedness, cannot be enforced unless some valid consideration be received by, or benefit or advantage has accrued thereby, to the creditor. *Ibid*.

2506. One who has executed a promissory note in error, for a debt not due by her, may legally resist the payment of the note, so long as the note is not in the hands of an innocent third person, who has taken it for value before its maturity. *Bridget Reardon v. Daniel Moriarty, et al.*, 30 La. 120.

2507. The maker or indorser of a promissory note cannot, as against an indorser of the same, in this State, for value before



maturity and without notice show that the note, although dated in Boston, with intent that it should be a Massachusetts contract, was actually made in New York, and on account of illegal interest, was void under the Usury Law of that State. A promissory note, indorsed "L. R., receiver," binds him personally. *Towne v. Rice*, 122 Mass. 67.

**2508.** One who is in fact the owner of a note negotiable by indorsement may maintain an action upon it, although no indorsement thereof has been made to him; and an indorsement subsequent to the commencement of the action, made by the payee, will relate back to and ratify a prior sale of the note made by an agent of such payee. *Weeks v. Medler*, 20 Kansas, 57.

**2509.** An instrument which, in its terms and form, is a negotiable promissory note, does not lose that character because it also recites that an additional rate of interest will be paid "after due;" that the maker has deposited certain certificates as collateral security for the payment of the note, and states the terms upon which they have been deposited and upon which they may be sold by the holder on the non-payment of the note. *Towne v. Rice*, 122 Mass. 67.

**2510.** In action on a note and mortgage, when it is admitted that the plaintiff is the holder of the note, which is indorsed in blank by the payee thereof, the law will presume, in the absence of any evidence to the contrary, that the plaintiff is an innocent and *bona fide* holder for value, and that it was indorsed to him before due. *Acton v. Harlan*, 20 Kansas, 452.

**2511.** The title to negotiable paper cannot be defeated by proof of negligence, or want of diligence in inquiring into the title or the equities between the parties thereto. Nothing but fraud will defeat the title thereto. The legal presumption as to an indorsement on negotiable paper is, that it was for value, and for a proper purpose; and where such indorsement purports to be the act of a corporation, through its proper officer, one taking negotiable paper so indorsed, for value, before maturity, is not bound to inquire whether the indorsement was made in the regular course of the business of the corporation, or was for the accommodation of the officer, or was without consideration. *Lafayette Savings Bank v. St. Louis Stoneware Co.*, 4 Mo. Court of Appeal (St. Louis) 276.

**2512.** When a negotiable promissory note, due sixty days after date, and indorsed by the payee in blank, is put in suit by a third person, the production of the note by the plaintiff, at the trial, is *prima facie* evidence that he acquired it for value before maturity, and without notice of any fact going to defeat its collection. As against him, payment made to payee will not be a defence, without showing that the payee had possession of the note at the time, or was then the owner of it, or for some other reason had a right to receive the money. Generally, payment made to an agent who has parted with possession of the security to his principal, is no discharge. *Paris, et al. v. Moe*, *Adm'r*, 60 Ga. 90.

**2513.** A promissory note, due from a resident of Colorado to a resident of California, is in no legitimate sense the property of the debtor, and is not subject to taxation under the laws of Colorado (Sess. Laws, 1870, p. 88), although the note is secured by trust deed upon real estate

within the jurisdiction of the taxing power. *Com'rs Arapahoe Co. v. Cutter*, 3 Colo. 349.

**2514.** When the consideration for a promissory note was expressed in the note to be the stock of a railway corporation, and the directors of the corporation subsequently made an illegal and unauthorized increase in the stock of the company, it was *held* that such illegal increase would constitute a defence to an action upon the note. Following *Merrill v. Gamble*, 46 Iowa, 615; *Ante. Merrill v. Beaver*, 46 Iowa, 646.

**2515.** A note, or other written evidence of indebtedness, payable in *current funds*, is not to be regarded upon its face as negotiable. *Haddock v. Woods*, 46 Iowa, 433.

**2516.** In an action upon such paper it is competent to show by parol evidence the peculiar meaning of the term *current funds*, and that the parties understood it to mean money. While the understanding of the parties respecting the condition of the contract cannot be shown by parol, their understanding of the meaning of the words used therein may be competent. *Ibid.*

**2517.** This court has repeatedly recognized the rule that an express agreement must be shown to establish the fact that a bill or note of either the debtor or a third person was taken by the creditor in payment of a preëxisting debt. *Brewster v. Bours*, 8 Cal. 506; *Griffith v. Grogan*, 12 Cal. 320; *Welch v. Allington*, 23 Cal. 322; followed in *Brown v. Olmsted*, 50 Cal. 162.

**2518.** If the widow is executrix of the estate of the deceased husband, and the estate is community property, so that she has an interest in the same, and she gives her own note for a debt of the deceased husband, which is outlawed, under the mistaken opinion that it is not outlawed, there is a sufficient consideration to support the note. *Mull v. Van Trees*, 50 Cal. 547.

**2519.** The party who purchases a promissory note from the payee before it is due, but after the payee has executed to the payor a release of the same, without knowledge of such lease, is a *bona fide* holder, although he purchases for less than the face of the note, and as a speculation, and although by the exercise of a little diligence he might have ascertained that the release had been given. *Schoen v. Houghton*, 50 Cal. 528.

**2520.** If one party furnishes another one thousand dollars in money, and such other gives him his note therefor, with the understanding that the payor shall procure third parties to assign to himself certain liens on land claimed by the payee, which liens the payor shall hold for the benefit of payee in satisfaction of the note, the agreement amounts to an accord and satisfaction, and is a payment of the note. *Treadwell v. Himmelmann*, 50 Cal. 9.

**2521.** A contemporaneous written agreement, executed by the payee of a promissory note, showing a contingency upon which the payment of the note is to depend, is admissible in evidence, under the general issue, in an action on the note by an indorser after maturity against the maker. *Munro v. King*, 3 Colo. 238.

**2522.** In a suit on a note the affidavit of defence was that it had been given as a donation to a church, on condition that the lot on which it was erected should be conveyed to the church, which had not



been done. The suit was by the indorsee; the affidavit averred that defendant "verily believes and expects to prove that the note has been passed by the payee to plaintiffs to avoid making this defence, and that the plaintiffs sold the same to the use of the payee without consideration as between them." *Held*, sufficient against the indorsee. *Reznor v. Supplee*, 81 Penn. St. 180.

**2523.** Where two or more notes, secured by a single mortgage, fall due at different times, they shall be paid out of the mortgage fund in the order of their maturity, unless a different agreement has been made between the parties, or unless some paramount equity should require a different order of payment. *Richardson v. McKim*, 20 Kan. 346-350.

**2524.** The party, who was president and treasurer of a local board of trustees of an insurance company, gave a certificate that the insurance company had on deposit with him a certain number of dollars, and signed it, "H., president and treasurer, local board of trustees." *Held*, that the certificate, in legal effect, was H.'s promissory note, and in a suit at law against him by the insurance company he could show in defence that the contract of which it formed a part was rescinded, or that the contract was of mutual stipulations, and the payee had not performed on his part. *Hart v. Life Ass'n*, 54 Ala. 195.

**2525.** The maker of negotiable paper, which is void in the hands of the payee, may, in order to prevent its negotiation, maintain a bill in equity to compel its surrender for cancellation. *Breathuit v. Rogers*, *Adm'r of McLendon*, 32 Ark. 758.

**2526.** A promissory note given by the widow to a creditor of the deceased husband, who does not take it in payment of the debt, and neither lost nor suspended any remedy for its collection, or receipted the account, is without consideration. The fact that there has been no administration, and the widow remains in possession of all the real and personal estate of the husband—the possession not being derived from the creditor—forms no consideration for such a promise. *Watson v. Reynolds & Stuckey*, 54 Ala. 191.

**2527.** A promissory note, which is payable "on or before three years from date," is not due until the three years has expired; and a purchaser for value within that time is entitled to the same protection as if the note was made payable three years from date. *Mallison v. Marks*, 31 Mich. 425; also, *Helmer v. Krolick*, 36 Mich. 371.

**2528.** If a promissory note, signed by one member of a partnership in the firm name, is given in payment of debts, some of which were contracted before another member came into the firm, and the rest thereafter, and an action thereon by the payee of the note is defended by such other member alone, the plaintiff, in the absence of evidence of actual fraud on his part, or of knowledge when the party defending entered the partnership, is entitled to recover for such debts covered by the note as were contracted after he became a member. *Gould v. Belcher*, 119 Mass. 257.

**2529.** The note sued on having been transferred to plaintiff as collateral security for money loaned before due, it was a *bona fide* holder thereof; consequently the verdict, finding for the defendant, on a plea of failure of consideration, was contrary to law. *Exchange Bank v. Butner & Edgeworth*, 60 Ga. 654.

**2530.** Three promissory notes, made by the lessee payable to the lessor at different dates, were given to and accepted by him in consideration of the surrender of a lease in a building, which lease provided that, in case of the destruction of the premises by fire, the rent should be suspended or abated. The first two notes were duly paid, and before the last note was due the premises were destroyed by fire. *Held*, that the consideration of the notes given by the lessees was the acceptance by the lessors of the surrender of the lease. After this the defendants had no interest in the real estate, and their liability upon the notes was not affected by the condition of the premises, or by the provisions of the lease, which had ceased to exist. *Brooks v. Cutter*, 119 Mass. 132.

**2531.** A protested draft is not an obligation within the meaning of the proviso of the Act of 16th of April, 1850, which declares that the assignees of an insolvent bank "shall receive in payment of debts due to said bank its own notes and obligations and the checks of its depositors at par." *Basehore v. Rhodes*, 85 Penn. St. 44.

**2532.** In an action upon a promissory note, in which the declaration alleges that the defendant made the note, and the answer denies this, and alleges an alteration, proof of the defendant's signature is *prima facie* evidence that the whole body of the note written over it is the act of the defendant, but the burden of proof is on the plaintiff to show that the note declared was the note of the defendant. *Simpson v. Davis*, 119 Mass. 269.

**2533.** The addition of the name of another joint maker to a note, without the knowledge or consent of the others, is such a material alteration as releases them from liability thereon. The last signer, however, is not released by the discharge of his cosigners, and he is liable for the amount of the note. *Hamilton v. Hooper, et al.*, 46 Iowa, 515.

**2534.** A promissory note being accepted by the parties, in interest, in payment of a debt, the taking of such note, in pursuance of the agreement, merges the original cause of action in the note. If such agreement was in fact made, and note given in pursuance thereof, the creditor cannot rescind such contract for the purpose of suing upon the original cause of action by simply returning the note. *Kappes, et al. v. Geo. E. White*, 1 Bradwell's Ill. App. Rpts. 280.

**2535.** Where a note provided for interest at 10 per cent. per annum, and the mortgage executed to receive it stipulated for "interest at the rate of 10 per cent. per annum, payable annually, according to the terms of the promissory note," *held*, that the mortgage provided for something respecting which the note was silent, and would, therefore, govern. *Dobbins v. Parker, et ux.*, 46 Iowa, 357.

**2536.** Defendants were partners, and K., one of them, furnished money to be used in the partnership business, and took a note therefor, payable to himself, or order, and signed by himself and the other defendants. K.'s wife became the owner of said note, and sent it to plaintiff by K. for collection, and K. indorsed it to plaintiff for collection merely. K. made no defence to the note. *Ormsbee v. Kidder, et als.*, 48 Vt. 361.

**2537.** If the payor of a note conveys land to the holder, by way of security for its payment, and the holder afterwards sells the notes



to a third person, and then conveys the land to another person to secure his own debt, these facts do not constitute a defence, if such third person sues the payor to recover on the notes. *Kiel v. Reay*, 50 Cal. 61.

2538. The omission to insert in a note given for a patent right the words "Given for a patent right," inserted therein, as required by statute, does not render the note void. If the patent right is good and valid, and forms an adequate consideration for the note, the maker cannot defend against a transferee of the note on the ground of the omission of those words. The object of the statute was to prevent the transfer of such notes to innocent and *bona fide* holders. *Streit v. Waugh*, 48 Vt. 298.

2539. Nor can the maker defend upon the ground that the plaintiff received the note from another transferee in payment for liquor sold in violation of law. *Ibid.*

2540. It cannot render a purchaser of negotiable paper suspicious that the payee has an interest in getting it off his hands; this fact would not necessarily be known to the purchaser, or influence in any manner his action; and in determining whether a purchaser is entitled to be considered a *bona fide* holder, it is his *bona fides*, and not that of the payee, that is in question. *Helmer v. Krolick*, 36 Mich. 371.

2541. A promissory note, left blank as to the amount, but perfect in all other particulars, and providing for a certain rate of interest "per annum," was executed by one as principal, and by another as surety, and entrusted by the latter to the former for delivery to the payee; whereupon the payee's agent, with knowledge of the relations of the makers as principal and surety, filled up the blank, and altered the note, by direction of the principal, but without the knowledge or consent of the surety, so as to make it bear interest "after maturity." *Held*, that such alteration relieved the surety from all liability thereon. *Franklin L. Ins. Co. v. Courtney*, 60 Ind. 134.

2542. A promissory note, given in a gambling transaction, is void; although negotiable in form, and in the hands of an innocent holder for value. *Harper v. Young*, 112 Penn. 419.

2543. The fact that a fraudulent device was superadded to induce the giving of the note does not destroy the gambling motive of the scheme. *Ibid.*

2544. On a collateral contract to pay a certain sum per month as interest on a note, if it should not be met at maturity, payee, who has indorsed the note away, cannot recover. *Florence v. Drayson*, LXXXVII. 584; L.C. B. N. S. 584 (Eng. Com. Law).

2545. A. being indebted to B., as a surety, in order to enable B.'s agent to raise money, and to obtain further time on the debt to B., made his note to the agent upon an agreement that if he should have to pay the note, the amount paid should be entered as a credit on the debt to B. The agent assigned the note to the plaintiff for value; after the assignment his agency ceased, and the debt to B. was paid by the principal debtor. *Held*, that at the time of the assignment there was a subsisting consideration, and the subsequent failure of consideration could not affect the right of the plaintiff (the assignee of the note.) *Woodruff v. Webb*, 32 Ark. 612.

**2546.** Where, by mistake, note at two months, dated January 1st, 1854, instead of January 1st, 1855, and across the face was written, "Due March 4th, 1855," *held*, that the date was 1855, and the memorandum was as if correction of error. *Fitch v. Jones*, LXXXV. 238; 5 E. & B. 238 (Eng. Com. Law).

**2547.** Negotiable paper, payable at a time certain, is dishonored by mere non-payment at the time, and no one is a *bona fide* holder, without notice, who does not take such paper before maturity. When the time of payment of a negotiable note is extended by agreement, a reference to which is indorsed upon the back, one who takes it after its original maturity will be subject to all equities between the parties. *Dryer v. Mercantile Bank*, 4 Mo. Court of Appeals (St. Louis) 598.

**2548.** If A. & B. enter into partnership, and B. is to furnish \$1,000 as his part of the capital, and B. hands the money to C. to deliver to A., and A., when he receives it, gives C. his promissory note for it, the note is given without consideration. *Ayer v. Duncan*, 50 Cal. 325.

**2549.** When the maker of a non-negotiable promissory note is at the maturity thereof bankrupt, the assignee and holder of the note may at once sue the assignor, without waiting for final distribution of the estate of the bankrupt maker, the bankruptcy of the maker being a breach of the implied warranty of the assignor. *Lowenstein v. Knopf*, 4 Mo. Ct. Appeals (St. Louis) 594.

**2550.** Where the maker of a promissory note, payable to a certain person or bearer, on being inquired of by a third person to whom the payee had offered after its dishonor to sell it, answered that it was all right, and that he would pay it, and thereupon the purchase was made and the price paid, the maker is estopped from setting up failure or want of consideration, or any other equity existing between himself and the payee, to an action brought upon the note by the purchaser or his privies. *Reedy v. Brunner & Co.*, 60 Ga. 107.

**2551.** Where it is claimed by a party defendant that the date of the note in suit is a mistake, and the note on its face is payable six months after date, and such defendant claims that the note was in fact paid when due (which was six months before the date at which it purports to have been executed), the testimony of an indorser of such note that he indorsed such note at the place of its date, in the State of Kansas, at or about the time claimed by the maker as the date of execution, and that he was absent from the State during all the time for a period, commencing some three months before the date appearing on the note, and extending some five months beyond such date, is competent as tending to show a mistake in the date of the note. *Clary v. Smith*, 20 Kansas, 83.

**2552.** In an action upon a negotiable promissory note, it will devolve upon the defendant to show, if he so claims, that the note was fraudulently obtained, or that it was executed without sufficient consideration, or that it has been paid. *Ecton v. Harlan*, 20 Kansas, 452.

**2553.** Where a person, possessed of the ordinary faculties and ability to read, signs and delivers a negotiable promissory note, without knowing it to be such, but without reading the same, having an opportunity to do so, relying solely upon the representation of the payee that the paper was an instrument other than a note. *Held*, as



against a *bona fide* holder before maturity for value, such maker will not be permitted to deny the due execution of the note. *Winchell v. Crider*, 29 Ohio, 480.

2554. A purchaser of negotiable paper is not put upon inquiry by mere knowledge that the payee is engaged in selling intoxicating liquors, to ascertain whether the consideration of the paper was not the unlawful sale of such liquors. *Bottomley v. Goldsmith*, 36 Mich. 27; also, *Paton v. Coit*, 5 Mich. 505.

2555. In an action against the maker by a *bona fide* indorsee, before due, and for value, of a negotiable promissory note, the defendant is liable, if guilty of negligence in the execution thereof, although he did not intend to sign a note, and was induced, through fraudulent representations as to its character, to believe that the instrument executed was one of a different purport. *Ross v. Doland*, 29 Ohio, 473.

2556. A person, who negligently signs and delivers to another a printed form of a negotiable promissory note, containing blanks, without knowing it to be such, is estopped as against a subsequent *bona fide* holder for value, and before due, from denying authority in the person to whom it was delivered to fill the blanks. *Ibid.*

2557. Prior equities of antecedent parties to negotiable paper, transferred in fraud of their rights, will prevail against an indorsee who has received the paper in nominal payment of a precedent debt, where there is no evidence of an intention to receive it in absolute discharge and satisfaction beyond that of accepting or receipting it in payment, or crediting it on account. *Phoenix Ins. Co. v. Church*, 81 N. Y. 218.

2558. A petition against several makers of a joint and several note more than fifteen years past due, whereon payments have been made within the time of the statute, but by whom paid not appearing, does not show a statutory bar in favor of any of the defendants. Where the holder of a note past due receives from the principal debtor, without the knowledge of the surety, a sum of money greater than the amount of interest then due, and the amount so received is indorsed on the note as received on account of interest, it not appearing that such indorsement was made by the holder, or that he had knowledge that the same was so made, it is not error to refuse to charge the jury that in law such receipt and indorsement constituted an agreement to extend the time of payment of the note for such period of time as such sum would pay interest. *Vose v. Woodford*, 29 Ohio, 245.

2559. A. made his promissory note, expressed to be for value received, whereby he promised to pay B. or bearer forty dollars profits, with interest, one year from date. As to A., the note was entirely without consideration, and was obtained from him by fraud. The plaintiff subsequently became the innocent *bona fide* purchaser thereof before maturity. *Held*, that the instrument in the hands of the plaintiff was a valid, negotiable promissory note, and might be recovered; that the word "profits," as to the plaintiff, did not express or suggest a contingency or uncertainty, but an absolute existing fund as the consideration of the promise, and on account of which the money was to be paid, and that the word, as inserted in the note, was not such an apparent defect or infirmity as to put the plaintiff upon inquiry. *Matthews v. Crosby*, 56 N. H. 21.

**2560.** In a suit brought against the administrator of a deceased person to recover the amount due upon a promissory note, the defendant should be allowed to allege and prove that the note was made and delivered to plaintiff, without consideration, for the sole purpose of protecting the property of the deceased from his creditors, and that it was agreed between plaintiff and said deceased at the time of the execution of said note that it should be cancelled whenever so desired. *McCausland v. Ralston*, 12 Nevada, 195.

**2561.** In an action brought upon a promissory note to recover of one of the indorsers the amount due, the indorser may be declared against as a guarantor, and held liable as such. *Sarbach v. Jones*, 20 Kansas, 497.

**2562.** Where a promissory note, obtained from the promisor by fraud, has been transferred to a third party before its maturity, the burden of proof is upon him to show that he purchased it for value in good faith; and to determine this, all the attendant circumstances of the transaction are to be considered. *Sullivan v. Langley, et al.*, 120 Mass. 437.

**2563.** In an action upon a promissory note it was alleged on the part of defendant, and evidence was given tending to prove, that two other notes were executed for the accommodation of one S., which were diverted from the purpose for which they were executed, and were indorsed, and transferred by S. to G. in payment of an antecedent debt, no new consideration being paid, and were transferred by G. to plaintiffs, that in payment of a balance due on said notes, the note in suit was given which did not have the indorsement of S., and that the original notes were surrendered; neither plaintiffs nor G. had notice that the original notes were accommodations notes. *Held*, that, assuming a defence existed as to the original notes, the surrender of the indorsement of S. upon acceptance of the new note made the plaintiffs *bona fide* holders for value, and so excluded the defence; and therefore a charge that the fact that none of the plaintiffs had knowledge of the character of the original notes was immaterial, was error. *Goodwin v. Conklin*, 85 N. Y. 21.

**2564.** Plaintiff made an oral contract with J. W. to carry an indebtedness of the latter for a year upon his giving short notes indorsed by the defendant P. and others, to be renewed from time as they fell due. In renewing one of the notes so given, but not indorsed by P., a note was presented to and received by plaintiff so indorsed, and in renewal thereof another similar note was given and received. In an action upon the last note, *held*, that there was a sufficient consideration for the indorsement of P.; that the plaintiff could have sued the note in renewal of which P.'s first indorsement was given, and the agreement would not have been a defence, at most it would only have constituted a counterclaim to the extent of the injury sustained by its breach; and that the canceling of that note and extension of time of payment furnished a good consideration; also, that it was immaterial at whose request the indorsement by P. was made. *Nat. Bank of G. v. Place*, 86 N. Y. 444.

**2565.** Good equitable defence by one maker of a promissory note that he was surety for the other, of which the holder had notice at the time the note was made, and that the holder has given principal debtor



time, preventing recovery. *Semble*, that the defence would be good, if the holder knew when he gave time that the defendant was surety. *Pooley v. Harridine*, XC. 431; 7 E. & B. 431 (Eng. Com. Law).

**2566.** The contract which the law implies from the indorsement of a negotiable note, is as conclusive against parol testimony as though it were written out in full above the indorser's signature. Parol testimony is inadmissible to change a simple, unqualified indorsement, whether in full or in blank, into an indorsement without recourse. *Doolittle v. Ferry*, 20 Kansas, 230.

**2567.** Where an insolvent merchant pressed by creditors, nominally sells to his penniless clerk a stock of goods which the clerk and he knows are not paid for, and accepts in payment of the goods a debt for pretended wages he owes the clerk, and the promissory notes of the clerk, the transaction will be considered a fraudulent simulation. *Sattler & Co. v. Leonard Marine*, 30 La. 355.

**2568.** Partial payment made by one debtor on a note, will not suspend the running of a statute of limitations in favor of the other debtors thereon, although the party paying be the principal debtor, and the others only sureties. *Steele v. Souder*, 20 Kansas, 39.

**2569.** A party knowing the signature to a promissory note to be forged, and intending to be bound by it, acknowledges it as his own, assumes the note as his own and is bound by it just as if it had been originally signed by his authority. *Wellington v. Jackson*, 121 Mass. 157.

**2570.** Note declared upon last pending action, copy annexed to declaration being still in existence, and produced at the trial, the trial may proceed without establishing a copy in lieu of the lost original, though a plea of *non est factum* be filed. The genuineness of the original, and the correctness of the preserved copy, may be established by parol evidence. *Jernigan Ex'x v. Carter*, 60 Ga. 131.

**2571.** Where a promissory note is signed by two, one being surety for the other, with the knowledge of the payee, but without any agreement to that effect between the payee and surety, time given the principal maker is a good defence in an action by payee against the maker who was surety. *Greenough v. McClelland*, C. V. 422; 2 E. & E. 422. Affirmed C. V. 429; 2 E. & E. 429 (Eng. Com. Law).

**2572.** The alteration of the date of a note by the holder, without the consent and to the prejudice of the maker, is a forgery and renders the note void. *Lemay v. Williams*, 32 Ark. 166.

**2573.** Where the note under seal, is made with an agent in his own name, for an undisclosed principal, whether he describes himself as agent or not, either the agent or principal may sue upon it. *Ludwig v. Gillepsie*, 105 N. Y. 653.

**2574.** Holder of a note secured by mortgage may proceed at law and in equity at same time till he obtains satisfaction of the debt. *Ober v. Gallagher*, 93 U. S. 199.

**2575.** A rent note being made payable to bearer, the defendant could not question the plaintiff's title thereto, unless it was shown to be necessary to his defence. A motion for non-suit, on the ground that the evidence disclosed that the note had been deposited with third persons as collateral security, and the debt was therefore due to them was properly overruled. *Greer v. Woolfolk*, 60 Ga. 623.

**2576.** Proof that the consideration of a promissory note upon which suit is brought was the unlawful sale of intoxicating liquors, throws upon the plaintiff the burden of showing that he bought the note in good faith and before it fell due. *Paton v. Coit*, 5 Mich. 505.

**2577.** Material alteration, the erasure of the word "surety" after the name of the signers of a note by the payee, before indorsement, is a material alteration discharging the surety, even though the note be transferred for value before maturity. *Lamb v. Paine, et al.*, 46 Iowa, 550.

**2578.** If a transfer of title in the note without assumption of liability is sought or desired, equally apt and well-known words are at hand. "Without recourse," relieves the indorser. *Doolittle v. Ferry*, 20 Kansas, 232.

**2579.** A promissory note of this form: "One year after date we promise to pay to the order of A. B., one thousand dollars, value received," and signed "George Moore, treasurer of Mechanic Falls Dairying Association" is the note of Moore and not of the Association; and it makes no difference that the plural "we" is used instead of "I." *Mellon v. Moore*, 68 Me. 390.

**2580.** To pass the legal title by the plaintiff in execution there must be an indorsement or assignment thereof in writing. *Anderson Ex'r v. Baker*, 60 Ga. 599.

**2581.** The legal import of a blank indorsement upon a promissory note cannot be varied by parol. *Martin v. Cole*, 3 Colo. 113.

**2582.** In a suit by a bank against the maker of a promissory note, a plea of the general issue admits the corporate existence of the bank and its capacity to sue. *Ticonic Bank v. Bagley*, 68 Me. 249.

**2583.** The assignment and delivery of a promissory note payable to order, before maturity, without indorsement, gives to the assignee only the rights of the payee, though it may have been taken in good faith and for value. *Allum v. Perry*, 68 Me. 232.

**2584.** An averment in a complaint on a promissory note, that a certain sum "is due, as principal and interest on said note," is equivalent to an averment that the note remains unpaid. *Downey v. Whittenberger*, 60 Ind. 188.

**2585.** A verbal acknowledgment of, and promise to pay a promissory note, made by one of its solidary makers before its prescription, will interrupt prescription as to all the makers. *Boullt v. Sarpy*, 30 La. 494.

**2586.** Forbearance to one maker of a promissory note does not discharge another, who, with knowledge of holder, gave note as accommodation. *Strong v. Foster*, LXXXIV. 201; 17 C. B. 201 (Eng. Com. Law).

**2587.** In order to make future services good consideration for a promissory note there must have been a contract for them. *Hulse v. Hulse*, LXXXIV. 711; 17 C. B. 711 (Eng. Com. Law).

**2588.** The mortgage note of a wife knowingly received by a creditor of the husband, in satisfaction, or security of the husband's debt, is in the hands of such a creditor, utterly null and void. *Claverie v. Gerodias*, 30 La. 291.

**2589.** Note given to creditor to induce him to sign composition



deed, consideration illegal. *Clay v. Ray*, C.XII. 188; 17 C. B. N. G. 188 (Eng. Com. Law).

**2590.** One who takes a promissory note as collateral security for a debt then created, and on the faith thereof, with notice of no equities, becomes a holder for value. *Logan v. Smith*, 62 Mo. 455.

**2591.** B. and C. being indebted to D., B. gave a promissory note to A., the agent of D., in payment thereof. When the note came due it was not paid, and A. agreed to assume the original debt and to transfer the note to C. on C's giving his promissory note to A. for the amount of the debt. Held, that C's note was given for a sufficient consideration. *Turner v. Rogers*, 121 Mass. 12.

**2592.** A creditor holding the mortgage note of a third person as collateral security is compelled to credit the debt due him with only the net sum he was legally able to collect on said note. *Bloun v. Liquidators of Hart & Hebert*, 30 La. 714.

**2593.** A promissory note, given to one creditor in consideration of an agreement in fraud of the maker's other creditors, is void as between the parties. *Fay v. Fay*, 121 Mass. 561.

**2594.** A promissory note is entitled to days of grace, and suit cannot be brought thereon until after they have expired. *McCoy v. Babcock*, 1 Bradwell's Ill. App. Repts. 414.

**2595.** In a suit on a promissory note by a *bona fide* indorsee for valuable consideration, against the maker, the simple fact that the indorser was at the time of the indorsement indebted to the maker, is no defence. *Price v. Keen*, 40 N. J. L. R. 332.

**2596.** A promissory note which has for its consideration the discontinuance by the holder of the note of certain criminal proceedings instituted by him against a party, for obtaining money under false pretences, is void. *U. Oganne v. Abraham Haber*, 30 La. 1384.

**2597.** One who executes a promissory note in the name of another, without authority to do so, becomes personally liable for the amount of the note. *Dowd, Brown & Co. v. Bishop & Co.*, 30. La. 1178.

**2598.** In an action on a promissory note payable to bearer, by one alleging himself to be the bearer, owner and holder thereof, it is unnecessary to allege delivery. *Block v. Duncan*, 60 Ind. 522.

**2599.** In order to recover from the maker of a promissory note, it is not necessary to make a demand at the place of payment designated in the note. *Henry Renshaw v. A. Keene Richards*, 30 La. 398.

**2600.** Absolute unconditional promissory note cannot be changed into conditional obligation by parol evidence in absence of fraud, accident, or mistake. *Haley Ex'r v. Evans*, 60 Ga. 157; also, *Brumby, et al. v. Barnard, Agent*, 60 Ga. 292; also, *Starr v. Mayer & Co.*, 60 Ga. 546; and *Wright v. Wilson*, 60 Ga. 614.

**2601.** Party taking a promissory note, with notice of fraud before indorsement, cannot recover. Assignee of bill or note without indorsement, takes, subject to all defences. *Whistler v. Forster*, 248; CVIII. 14 C. B. N. S. 248 (Eng. Com. Law).

**2602.** Promissory note, in consideration of forbearance to prosecute charge of obtaining money under false pretences, is illegal. *Clubb v. Hutson*, CXIV. 414; 18 C. B. N. S. 414 (Eng. Com. Law).

**2603.** One who takes a stolen negotiable instrument *bona fide* and for value is entitled to recover on it, though negligent in availing him-

self of means of knowledge of bad title. *Raphael v. Bank of England*, 84, 161; 17 C. B. 1861 (Eng. Com. Law).

2604. The single fact that a promissory note payable to bearer, was transferred to the plaintiff without consideration, or solely to enable him to bring suit upon and collect it, constitutes no defence to the action. *McWilliams v. Bridges*, 7 Neb. 419.

2605. S. is the owner of the negotiable note of M. for \$8,000, which he indorses and deposits with the bank as collateral security for a loan of \$4,000, obtained upon the discount by the bank of the note of B. S. sells the note to O., and gives O. an order on the bank to deliver the note to O. On the same day, O. presents the order at the bank, and is told that the president of the bank is absent from town. Some days thereafter O. has an interview with the president of the bank, and is then informed that the debt of S. is nearly paid, and that he would deliver the note to O. but for the service of an attachment upon the bank. The debt of S. is afterwards paid in full. Before the sale by S. to O., an attachment has been served upon M., at the suit of a creditor of S.; but of this O. had no notice when he purchased the note. After the sale and notice to the bank by O., an attachment was served upon the bank by another creditor of S. *Held*, the sale by S. to O. is valid, and he is entitled to the note as against the attaching creditors of S. *Blair & Hoge v. Wilson*, 28 Grattan (Va.) 165.

2606. An alteration of a promissory note in any material part renders it invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. *Brown v. Straw*, 6 Neb. 536.

2607. After an instrument is completed and delivered, no alteration can be made therein, except by consent; an alteration of the date, whether it hasten or delay the time of payment, is a material alteration, and if made without the consent of the party sought to be charged, extinguishes his liability. *Ibid*.

2608. Where a party contracts to pay 18 per cent. interest upon a promissory note at the time of its execution and delivery, the contract will be tainted with usury, although the rate of interest is not expressed in the note. *Keim & Co. v. Avery*, 7 Neb. 54.

2609. A surety may plead a defence to a promissory note that usurious interest was agreed upon by the parties at the time of the execution of the note. *Ibid*.

2610. The defendant being the payee of a negotiable promissory note, upon which his action is brought, his relation is such that he cannot in law be held to be the maker of such note, even though his indorsement was for the purpose of giving credit to the note. *Barnard v. Gaslin*, 23 Minn. 192.

2611. That the indorsement by the payee of a negotiable promissory note amounts in law to a contract on the part of such indorser, in which he undertakes to pay the note in case the maker fails to pay at maturity, and of which failure he has due notice; and his liability in this regard cannot be varied or qualified by a parol agreement or understanding simultaneous with that of the indorsement; and hence, parol evidence will not be received to vary this well recognized legal contract. *Ibid*.

2612. G. executed a promissory note to a railway company to aid



in the construction of a road between two points named in the note. At the time of its execution it was understood that the note, with others of like purport, if they reached a certain amount, was to be turned over to another company, which was to construct the road; they did not reach the amount, and the road was constructed by plaintiff, who was the assignee of the payee of the note. *Held*, that upon compliance with the other conditions of the note, it was collectible by plaintiff. It being stipulated in the note that the consideration therefor was to be capital stock of the railway company, which was to be limited to a certain specific amount, an illegal increase thereof would constitute a valid defence to the note. *Merrill v. Gamble*, 46 Iowa, 615.

**2613.** A material alteration in the terms or condition of a note, or other commercial paper, made by the holder thereof, with a fraudulent intent, will defeat recovery thereon. *Robinson v. Reed, et al.*, 46 Iowa, 219.

**2614.** A surety contracts to pay the note, while the guarantor undertakes to pay it upon condition that certain steps are taken, and any writing upon the note, therefore, which seeks to render a guarantor a surety is a material alteration. *Ibid.*

**2615.** Where the alteration is established, the holder has the burden to show that it was made innocently, for a proper purpose, or by a stranger, and in the absence of such proof it will be presumed to have been fraudulently made. *Ibid.*

**2616.** The party guilty of the fraudulent alteration cannot by removing it recover the right of action which he has lost by his fraud. *Ibid.*

**2617.** When a renewal note has been given, with an understanding that the original note shall be surrendered, if the renewal note is not paid at maturity, suit may be commenced thereon; and the mere fact that the original note had not been surrendered at the commencement of the action is no defence, when it appears that plaintiff has always held possession thereof, that its surrender has never been demanded, and when it is produced on the trial and tendered to defendant. The fact that the defendant, at the maturity of the renewal note, went to the bank, where it was deposited for collection, for the purpose of paying it, and refused to pay because the original note was not there to be surrendered, is no defence to the action, when it is shown that the money was afterwards demanded of him, and that he refused to pay on other grounds, and that plaintiff was at all times ready and willing to surrender the original on payment of the renewal note. *Fleirs, et al. v. Hellery*, 4 Mo. Ct. Appeals (St. Louis) 596.

**2618.** In an action by an indorsee against his indorser on a promissory note, which on its face was executed and payable at a bank in another State, the maker of which was alleged to be a non-resident of this State, all the evidence introduced was the note, the indorsement thereof and a protest. *Held*, on motion for a new trial, that the evidence is insufficient to sustain a verdict for the plaintiff. *Held*, also, that the indorsement, in the absence of evidence to the contrary, is presumed to have been made at the time and place of the execution of the note, and that the note and indorsement are governed by the law of that place. *Held*, also, it being presumed that

the common law prevails in that place, and promissory notes not being governed at common law by the law merchant, that the note in suit is not so governed. *Held*, also, that the statute of such State should be pleaded and proved, as courts of this State do not judicially know the law there in force. *Held*, also, that the evidence shows no diligence, and no excuse for a failure to use due diligence in proceeding against the maker necessary to bind the indorser of a note not payable in bank. *Patterson v. Carrell*, 60 Ind. 128.

**2619.** It is no defence to a suit against the maker of a negotiable promissory note by a national bank, which has discounted the note for an indorser, that since the commencement of the suit the indorser has paid the bank and taken up the note, and taken an assignment of the suit, and is prosecuting it for his own benefit. Such bank has power to free itself from litigation, and realize its money on a protested note by such an arrangement.

**2620.** Where there is no evidence of fraud or oppression, or any corrupt or improper motive, the owner of indorsed negotiable paper may maintain suit upon it against prior parties in the name of any person or party, capable of giving the defendant a discharge, who will consent to the use of his name for that purpose. It is not essential that a suit upon such paper should be brought or prosecuted in the name of one who has a personal interest in the enforcement of the promise. While the right of the defendant to assert such legal and equitable defences in a suit brought in the name of a nominal plaintiff, as he could maintain were the suit in the name of the real owner, will always be preserved, there being nothing in the case to show that the indorser, or his executor, had he taken up the note at its maturity, could not have maintained an action upon it in his own name. *Held*, that he may lawfully get the benefit of any attachment made by the bank by procuring their consent to the prosecution of the suit in the name of the bank. *Ticonic Bank v. Bagley*, 68 Me. 249.

**2621.** Under our Statute the title to a promissory note, whether payable to order or assigns or not, is transferred by indorsement; but the title to a promissory note payable to bearer is vested in each successive holder by the original promise of the maker to the bearer, and not by the assignment of the promise, Section 2228 of the Code of 1871 construed, which provides that "all promissory notes, and other writings for the payment of money or any other thing, may be assigned by indorsement, whether the same be payable to order or assigns or not; \* \* \* and in all actions on any such assigned promissory note, bill of exchange, or other writing for the payment of money or other thing, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and sets-off made, had, or possessed against the same previous to notice of assignment, in the same manner as though the suit had been brought by the obligee or payee." *Held*, (1) that the above statute applies as well to indorsements in blank as to special indorsements; (2) that it refers to assignments made in the due course of business, for value, and before maturity; (3) that it only changes law merchant so far as to allow the promisee to make any defences existing before notice of assignment against a remote holder, by indorsement, before maturity, which he could have made against the payee. *Etheridge v. Gallagher*, 55 Miss. 458.



**2622.** E. and wife sold a lot to C., and took in payment a promissory note payable to their order, which was transferred by indorsement in blank to W. F. E., and by him transferred for value, after due, to G. A bill was filed by G. to subject the lot sold by E. and wife to C. to the payment of the note held by him, E. and wife filed a cross-bill, alleging that the consideration for which the note was transferred to W. F. E. had failed, and the latter was insolvent, claiming that E. and wife had a superior right to the note, and that the lot should be sold for their benefit. G. demurred to the cross-bill for want of equity, and his demurrer was sustained by the Court. *Held*, that the action of the Court was correct. *Etheridge v. Gallagher*, 55 Miss. 458.

**2623.** Our Statute requires those in an action on a promissory note or bill of exchange all the parties thereto resident in the State shall be sued together. If it appears on the face of the declaration that any such party is omitted in the action, the omission may be taken advantage of by a plea in abatement. In an action upon a promissory note or bill of exchange, it is too late after trial to object, for the first time, that all the parties were not sued in the same action. *Ibid*.

**2624.** The defendants were the banker of both the plaintiff and one E., and E. having given a note payable to the plaintiff at the defendants' bank, the plaintiff, about two weeks before its maturity, left it with the defendants for collection, and to be protested if not paid. On December 4th, the day of its maturity, the ledger keeper debited E.'s account and credited the plaintiff with the amount of the note. Subsequently the manager, on the ground that the entry had been made by the clerk by mistake and without authority—as E.'s account was then overdrawn—caused the entry to be reversed, and refused to pay plaintiff the amount of it. E. stated that he always gave authority to pay each particular note, which he did not do here; and the manager stated that without such authority it was not the custom of the bank to pay any note. *Held*, that the plaintiff was entitled to recover the amount of the note from the bank. That by the general law the plaintiff by making the note payable at defendants' bank, authorized them to pay it; and that the act of the ledger keeper in charging it to E.'s account and crediting it to the plaintiff in his account and pass book, amounted to a payment of the note, and was irrevocable. *Nightingale v. City Bank*, 26 Upper Canada Com. Pleas, 74.

**2625.** Promissory note, signed "U. S. Manfg. Co., George H. Fox, treasurer." The plaintiff's case depended entirely on the validity of the promissory note, which Fox had assumed to give in the character and capacity of treasurer of the defendant company. Whether he had authority to do so was a vital question. F. was called by the defendant as a witness, and asked him, against the plaintiff's objection, whether or not he had authority to make this note as treasurer of the company. *Held*, that the question was inadmissible. All that could properly be obtained from him were the facts, by which the inference of authority was to be supported or repelled; and it was for the counsel to argue, and for the jury to find, under the instructions of the Court, whether the facts so given proved that he had the authority, which he denied. The question is fully discussed in *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197. The Court *held*, that a declaration of an agent to a third person is inadmissible in behalf of the principal to prove that

the person was not also his agent, or to support the agent's declaration.

**2626.** A promissory note, made by one of two members of a firm, in the hands of a *bona fide* holder for value, although not made in the partnership business, and although the other partners did not know of the making of the note. The note is presumptive evidence that it is valid business paper, and was given for a debt due from the makers to the payee. *First National Bank v. Morgan*, 73 N. Y. Ap. 593.

**2627.** Where a joint and several promissory note is signed by three persons, as makers, to the signature of the last signer, the word "surety" being added, the presumption is that he is surety for the other two; this presumption, however, is not conclusive. It may be shown that he was in fact surety for only one, and that the other signer was also surety. *Sales v. Sims*, 73 N. Y. Ap. 552.

**2628.** The possessor of negotiable paper has no better, or other title to the proceeds arising from the sale thereof, than to the paper itself, and if he has no title to the latter, he can be compelled to account to the true owner for the proceeds. *Comstock v. Hier*, 73 N. Y. Ap. 269.

**2629.** Testimony that such person was not an agent, because if the inquiry was whether he had an express authority, it was an inquiry concerning an immaterial matter; and if it was whether he had an implied authority, it was an inquiry as to an inference to be drawn by the jury from the facts in the case. *Providence Tool Co. v. United States Mfg. Co.*, 120 Mass. 35.

**2630.** On the 9th September, 1875, defendant indorsed a promissory note made by S. and C., bearing that date, and payable to him four months after date at the plaintiffs' branch at Ottawa, but without any amount being filled in. On the same day C. deposited it with the plaintiffs, authorizing them to fill it in for the amount of S. and C.'s then due paper, as also for other paper falling due before the 22d October. On the 21st October the plaintiffs filled in the note for \$4,835.84, which included defendants' then due paper, a sum of \$2,000 coming due on the following day, and \$2.94, the amount of the stamps which were there affixed. The stamps so affixed were sufficient to cover double duty, and were obliterated by writing across them the date on which they were so fixed, namely, 21st October, 1875. *Held*, that defendant, by so indorsing the note, authorized plaintiffs, as *bona fide* holders for value, to fill in the amount, and to affix and cancel the requisite stamps in the mode required by law; and that the note then become a completed note, but speaking from its original date, from which the four months would be counted. By 37 Vic., ch. 47, § 3, D., it is provided that in case a bank making or becoming the holder of a note not duly stamped, knowing the same, and not immediately affixing and canceling the proper stamps, within the meaning of 31 Vic., ch. 9, it should not only forfeit a penalty of \$500, but be unable to recover on such note, or make it available for any purpose whatever, and that it should be of no effect in law or equity. *Held*, that the stamps here were not properly canceled; for if affixed as agents of the makers, which the including them in the amount of the note was evidence of, then, under § 4 of 31 Vic., ch. 9, D., the date of the obliteration must accord with that of the note; whereas, if looked upon as subsequent holders, and as



affixing double duty, then, under section 12, as substituted by 37 Vic. ch. 47, § 2, the initials or name as well as the date are required. Semble, that the privileges accorded by the latter part of this substituted, section 12, to holders, who, from error or mistake, do not at the proper time affix the double duty, does not apply to banks, etc. *Le Banque Nationale v. Sparks*, 27 Upper Canada Com. Pleas, 320.

**2631.** Plaintiff held a note, whereon N. was principal, and defendants and others were sureties. Plaintiff and N. procured defendant W. to sign another note, agreeing at the time that it should not be used except to take up the former note, nor unless all the signers of the former note signed it. W. was induced by this agreement to sign said last mentioned note, which plaintiff well knew, and also knew that the note was to be presented to defendant S. by N., the principal thereon, with W.'s name on it, as an inducement for him to sign it, and that S. was thereby induced to sign; and plaintiff took the note, knowing S. had been so induced to sign, and advanced money thereon to N., instead of taking it in payment of the former note, as agreed. *Held*, that the defendants' relations as sureties, and said agreement, might be shown by parol, and constituted a defence to the note. *Harrington v. Wright, et al.*, 48 Vt. 427.

**2632.** The promissory note declared on was dated July 1, 1869, for \$1,000, payable on demand. The evidence at the trial was that the plaintiff lent the defendant \$1,000 in July, in 1868 or 1869, and at the same time received from him a note, which, there being no evidence when it was payable, might be presumed to be payable on demand; and that this note had been lost, and could not be produced. This evidence was sufficient, in the absence of evidence that any other note of this amount was ever given by the defendant to the plaintiff, to identify the note in suit, and to warrant the jury in returning a verdict for the plaintiff, and the court in rendering judgment in her favor upon her filing a sufficient bond of indemnity. The assignment of all the payee's right in the note, without any indorsement, did not prevent the maintenance of an action upon the note in the name of the payee. *Tucker v. Tucker*, 119 Mass. 79; also, *Clark v. Houghton*, 12 Gray, 38; *Goddard v. Sawyer*, 9 Allen, 78; *McGregory v. McGregor*, 107 Mass. 543; *Nichols v. Allen*, 112 Mass. 23. As to assignment, referred to: *Foss v. Nutting*, 14 Gray, 484; *Cook v. Fellows*, 1 Johns. 143; *Smalley v. Wight*, 44 Maine, 442.

**2633.** In an action on a promissory note against the maker, the defence was that the note in suit was signed by the defendants at the request and for the accommodation of the O. R. Co., the payee, and of W. H. and P., the indorsers, who were officers or stockholders of said company, and that the note had been paid by the indorsers. The evidence tended to show that after the note matured G., acting for the indorsers, made an arrangement with the plaintiff corporation, by which he was to give it their note for the same amount; that he gave it such note, signed by W. H. and P., and the note in the suit was delivered to him. The principal question at the trial was, whether the new note was given in payment of the note in suit, or merely as a collateral security for it. Upon this issue the court instructed the jury that, as the transaction took place in Connecticut, it was to be governed by the law of that State: that by that law the giving of a promissory note

was not presumed to be in payment of a preëxisting debt, and therefore, before they could find for the defendant, they must be satisfied that, by the agreement of the parties, the plaintiff received the new note in payment of the note in suit. *Held*, also, the plaintiff, having requested an instruction, that the presumption of law is that the holder did not intend to accept the note in payment, and to discharge the maker of the note in suit, and, unless the jury find that a distinct agreement was made to accept the note in payment, they cannot find that it was accepted in payment, and the instruction being given in substance, though not in the words requested, that the plaintiff had no ground of exception. *Connecticut Trust Co. v. Melendy*, 119 Mass. 449.

**2634.** A promissory note, the following being a copy thereof: "\$2,268.00. Boston, February 1st, 1872. For value received, I promise to pay to Benjamin B. Newhall, or order, \$2,268.00 in one and a half years, or sooner, at the option of the mortgagor, from this date, with interest, to be paid semiannually, at the rate of seven per cent. per annum during said term, and for such further time as said principal sum, or any part thereof, shall remain unpaid. Secured by mortgage of real estate in Boston, Mass., stamped as required by U. S. Internal Revenue Laws, to be recorded in Suffolk Registry of Deeds. (Indorsed) Waving demand and notice. Benjamin B. Newhall." *Held*, that each of the instruments in suit expresses a promise to pay a certain sum of money in a year and a half from its date, "or sooner, at the option of the mortgagor," with interest, at a certain rate, "during said term." The principal sum is to be paid, either at the time specified, or at any earlier time that the mortgagor may elect. The interest is to be computed only until the note is paid. Both the time of payment of the principal and the amount of interest are uncertain, and depend upon the election of the mortgagor, who would seem, from the memorandum upon the note itself, to be the maker of the note. But if he were a third person, it would not aid the plaintiff. In either alternative the contract, not being a promise to pay a fixed sum of money at a definite time, lacks the essential quality of a negotiable promissory note, and cannot be sued as such. *Way v. Smith*, 111 Mass. 523; *Hubbard v. Mosely*, 11 Gray, 170; *Story on Notes*, § 22; *Stults v. Silva*, 119 Mass. 137.

**2635.** A promissory note executed by a married woman in the ordinary form, and perfect in its terms, the fact, that in order to make it binding upon her, the addition of other terms not suggested by the paper itself is required, *i. e.*, an expression of an intent to charge here separate estate, does not justify the payee in making such an addition after delivery of the note and without her knowledge and consent; and if so made it is a material alteration which vitiates the instrument. An authority, however, given by the maker to the payee, to add anything to the note which counsel when consulted may suggest to be needful to make the note "right, legal and proper," is sufficient to authorize such an addition as will make the note legal and binding upon her, and it is not material that she is not advised of the precise terms of the addition. *Taddiken v. Cantrell*, 69 N. Y. 597.

**2636.** A promissory note made for the accommodation of the payee, but without restriction as to its use, an indorsee taking in good



faith as collateral security for an antecedent debt of the payee and indorser, without other consideration, occupies the position of a holder for value, and can recover thereon against the maker. The precedent debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intended, by the payee, or where some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to enforce the same. *Grocers' Bank v. Penfield*, 69 N. Y. 502.

**2637.** A promissory note made payable "at any bank" in a specified city, proof of presentation at any bank in such city, and due protest and notice, will bind the indorser. The protest of a note payable "at any bank in Savannah, Georgia," showed that the note was presented for payment "at the Southern Bank of the State of Georgia," but did not expressly state that this bank was in the City of Savannah. The caption showed that the protest was in the City of Savannah, Georgia, and the protest cited that the notary resided in that city. After showing demand and refusal of payment, etc., it concludes: "Thus done and protested in the City of Savannah aforesaid." *Held*, (1) The protest sufficiently showed that the bank, at which demand was made, was located in the City of Savannah. (2) Parol proof was admissible, in connection with the protest, to show that a bank of the same name as that mentioned in the protest, was located in the City of Savannah, at the date of the note and its protest. *Boit & M. McKenzie v. Corr*, 54 Ala. 112.

**2638.** In an action on a promissory note by the payee against the maker, on the issue of payment, it appeared by an agreement of even date between the parties, that the maker was to transfer to the payee certain shares of stock in a corporation as security for the payment of the note, and, in case of his failure to pay, the payee was to take the stock in full satisfaction; that, before the note became due, the maker executed an instrument purporting to be a transfer of the stock to the payee, and produced a certificate of stock, which stated that the maker was owner of the stock, and that it was only transferable on the books of the corporation; and that these instruments, together with the original agreement, were deposited by mutual consent with a third person. *Held*, that the transfer and certificate were admissible in evidence; that it was competent for the judge, who tried the case without a jury, to find that the third person held the stock; that the transfer conveyed a title between the parties; and that the maker might testify that he had paid for the stock in full. *Brown v. Smith*, 122 Mass. 589.

**2639.** A promissory note in the usual form, with interest coupon notes attached, but containing a clause that if default be made in the payment of any instalment of interest when the same becomes due, and such default shall continue for thirty days, then the principal sum shall, at the election of the holder of said note, become due and payable, such election to be made at any time after said thirty days, without notice, is such an obligation as is denominated in law a promissory note. *Sea v. Glover*, 1 Bradwell's Ill. App. Rpts. 335.

**2640.** In construing the contract of guaranty thereon, it is immaterial whether the instrument is technically a promissory note or not. It is an obligation, the performance of which the guarantor had a right

to guarantee, and the undertaking of the guarantee is that the maker of the note shall meet his undertaking according to the terms and spirit of the contract, and on a failure so to do the contract of guarantee is broken, and the liability of the guarantor arises. *Ibid.*

2641. The guarantor is liable on his contract when the holder of the note elects to declare the whole sum due by reason of default in payment of interest, even though the principal sum is not due, by the terms of the note. Bringing suit is sufficient notice of the election of the holder of the note to declare the whole sum due. *Ibid.*

2642. This action was upon a promissory note, made and executed by the S. J. W. and indorsed, among others, by defendants, H. and E., for the accommodation of said corporation, and discounted by plaintiff. The defence was that after the indorsers were duly charged the note was paid by the substitution of a renewal note, not indorsed by the defendants, and the payment of the discount, and when the first renewal note became due, the discounting of another note, to take up the first renewal note, which second renewal note was also without the indorsement of the defendants. The court found, among other things, in substance, that at, about or shortly after the maturity of the note in suit, the maker, by its treasurer, Bean, presented to the plaintiff another note dated September 19, 1872, and in all other respects precisely like said first note, except the indorsement of the defendants E. & H., and requested the plaintiff to take the same in renewal of said first note. The plaintiff refused without the indorsement of E. & H. That thereupon Bean left the second note with the plaintiff, together with a sum which would amount to the discount thereon, saying he would procure E. & H. to call at the plaintiff's bank and indorse the same as they had agreed. That thereupon, and solely in anticipation that said indorsements would be made, the plaintiff's bookkeeper entered said second note on the books of the plaintiff. That at or about the maturity of the second note, the same not having been indorsed by E. & H., the said iron works by their treasurer, presented the plaintiff another note dated November 21, 1872, and in all other respects precisely like said second note, and requested the plaintiff to take the same in renewal of said first note. This the plaintiff refused to do, unless the indorsements of said E. & H. were procured thereon. Said Bean therefore took said second note and left said third note with the plaintiff, together with a sum which would amount to the discount thereon, saying, he would have said E. & H. call at the plaintiff's bank and indorse the same, alleging some excuse why they had not already done so. That neither E. nor H. ever called or indorsed said note. That said first note has not been paid or renewed, or the payment thereof extended in any manner. That neither said second or third note was discounted by the plaintiff or taken in renewal of said first note. Court of Appeals, Miller, J. This case involves a question whether there was an extension of the time of payment of the note upon which this action was brought, and a suspension of the right of action on the same, by the substitution of a renewal note became due by the discounting of another note to take up the first renewal note, which also was without the indorsement of the defendants, who have appealed. The judge upon the trial found that the first note was not paid or renewed in any manner, and that neither the second



nor third note was discounted by the plaintiff or taken in renewal of the first note. I think that these findings are sufficiently supported by the testimony. The proof shows that when the agent of the iron company presented the first renewal note to be discounted, his proposition was declined upon the distinct ground that the note had not the indorsement of H. & E. The agent then stated that they were to have been on, and said that they would call in and indorse the notes. The same promise was substantially made upon the presentation of the second renewal note, and excuse given why it had not been done. The payment of the discount, it appears, was made upon the same condition, and the facts in connection with the retaining of the possession of the old note tend to establish an agreement that each of the renewal notes were received, and agreed to be discounted only upon the condition stated. The entry on the books of the plaintiff shows, on its face, that the renewal notes were discounted, and that both the original and the second note were paid, and is a strong circumstance against the conclusion that the renewal notes were received conditionally; but this fact was subject to be, and as the finding of the judge shows, was explained by evidence to the effect that these entries were made by the bookkeeper, and it is claimed in anticipation that the agreement would be perfected by the indorsement of the two defendants named. It must be confessed that the testimony is not very satisfactory; but if we allow full credit to explanation given for the entries made, I do not see why it is not sufficient. Such a state of facts might well exist in entire harmony with the theory that no extension of the time of payment was made, and conceding that such was the case, the finding of the judge would be justified. The counsel for appellants claim that the notes were and must have been received upon some agreement, and that this is expressed in the testimony of the cashier, who, in answer to the question put, How the entries came to be made in the book, answered: Because Bean told him that the indorsers would come in, in a day or two, and indorse. This answer should be considered in connection with all that transpired, and, among other things, with the explanation subsequently given to the effect that the entry was made by the bookkeeper, as well as the other circumstances. Certainly the testimony referred to was not entirely conclusive, and was for the judge to pass upon in connection with the other evidence upon the trial. Although the circumstances are quite strong to show that the second and third notes were discounted and the previous note taken up, yet there was an explanation of these facts which, if believed, tended very much to support the finding of the judge; and we are not at liberty to disturb the same. *Auburn City National Bank v. Hunsiker, et al.*, 72 N. Y. App. 252.

2643. A party authorized to sell property, in the absence of any express limitation of his powers, is authorized to do any act, or to make any declaration in regard to the property found necessary to make a sale, and usually incidental thereto. This action was brought to have three promissory notes, made by plaintiff payable to his own order, and indorsed by him, declared void for usury, to compel a cancellation thereof, and return of certain stock pledged as collateral, and for an injunction, receiver, etc. The notes were delivered by plaintiff to B. & Co., note brokers in the city of New York, of whom plain-

tiff had been in the habit of purchasing commercial paper to a large amount, and to whom he was indebted upon account, to be sold at a discount of 12 per cent., and the avails to be applied upon plaintiff's account. B. & Co. sold the notes to defendant G. at the rates stated. Prior to the execution by plaintiff of any note, and before B. & Co. had received any authority to sell, G. applied to the latter to purchase notes, saying he desired first-class business paper only. B. & Co., said they would have paper of that kind, and mentioned the plaintiff's name. Shortly after they procured a note from plaintiff, with authority to sell at a discount of 12 per cent., and apply the proceeds to his indebtedness to them. B. & Co., sent this note to G., who purchased it at 12 per cent. *Held*, it cannot be successfully contended that the notes in question had an inception before they were passed to G. The indebtedness to B. & Co. would have been a good consideration for them, and had that been merged in them, and they given as evidence of its existence (*Wilkie v. Roosevelt*, 3 John. Cases. 66), they would have had an inception prior to the taking of them by G. But they were not given for that indebtedness. They were made for just the purpose for which they were used, to be sold at a discount of 12 per centum per annum. The avails of the sale were to be applied on the indebtedness, and thus only was the indebtedness affected by them. That being so, it is plain that they were taken by G. at a usurious discount; and that they are void, unless Ahern is estopped from setting up the usury. An estoppel arises in such cases when the maker of the note, before the sale of it, has declared to the buyer that it is a business note, and the buyer has so acted thereupon as that he will be harmed if the usury is known. Was Ahern brought within that rule? He did not in person make such declarations. It is claimed that B. & Co. were his agents, and that they made such declarations acting as his agents, and with power to make them. We will first see whether they did so represent, and then whether they had authority so to do; or, if not, whether their act in so doing had been adopted and satisfied by Ahern. *Ahern v. Goodspeed*, 72 N. Y. App. 108.

**2644.** The trial Court found that B. & Co. made declarations to G., at the time, and of a purport sufficient to bring them within that rule, and that G. acted upon those declarations. It is manifest that he would be pecuniarily harmed if the usury is shown, and the notes declared void therefor. The plaintiff urges, however, that there was no evidence to sustain the finding above mentioned. The testimony that the declarations were made by B. & Co. is sufficient to sustain the finding in its substance, so far as the making is concerned. *G. asked of them for first-class business paper. They said they had a good supply.* They opened their book and began to show their business paper. He said he wanted first-class business paper, secured by collaterals. They told him they had just the notes—some of that class of paper—that is, as I read it, first-class business paper, secured by collaterals. He had before that bought paper of them—impliedly business paper. It is shown that it was accompanied by collaterals. They said that they would have some of that—that is, paper of that character; and then mentioned the name of Ahern. They said that they had some of that kind of paper, and told him about the standing of Ahern. All that had been before declared concerning it still attached to it, and made a part



of the continuous transaction. It was taken by G., and sold by B. & Co., as the note which was the subject of offer by them, and of consideration by him, and of his and their acts and declaration. It was taken in reliance thereon. Though at the hour, or during the day, of the making of a representation as to property offered for sale, the subsequent vendee, then negotiating for it, or the like of it, does not conclude a bargain for it, if he afterwards, as a continuation of the negotiation, becomes a purchaser, the representations are still a part of the *res gestæ*, and bind the maker of them (see per Holt, C. J. *Lyney v. Selby*, 3 La. Raym. 118-20; *Wilmot v. Hurd*, 11 Wend. 584). As to the other two notes, the testimony of G. is explicit that B. & Co. told him, at the time of sale of them, that they were business paper, and the best kind of business paper. From all that is testified to by G., the inference is easy and natural that he would not have taken the notes, had he not believed that they were business paper, and that he so believed, from what was said and took place between B. & Co. and him. *Ibid.*

2645. If B. & Co. were agents of Ahern, with authority to make such declarations, and to do such acts concerning the notes, he also is estopped. B. & Co. were not the agents of G. He went to their place of business to buy of them what they had to sell, for themselves or others. They did not own these notes. If they had owned them, the notes would have had an inception in their hands, and a different question would have arisen. So they did not sell them as their own. They sold them for a principal, who could be no other than Ahern. They had been his agents in brokerage, or other pecuniary transactions, for some time. It was from such things that his indebtedness to them grew up. They charged him their commission on the sale of these notes to G., and thus he paid them their hire as his agents. His indebtedness was paid by the sale of these notes, and he received and retained a check of B. & Co. for a balance thereafter due to him from the avails of the sale. *Ibid.*

2646. Here arises an interesting question in the case. When B. & Co. made the representation to G., upon which the first note was taken by him, that note was not in existence, nor had Ahern authorized them to sell a note of his to G. or other person. It is said that they were not then his agents, and that whatever they said at that time could not affect him. It is not needed that there be an express act of ratification, in order to hold the principal. His subsequent assent may be inferred from circumstances, which the law considered tantamount to an express ratification. And the acts of the principal are to be construed liberally in favor of the adoption of the acts of an agent. (*Codwise v. Hacker*, 1 Caines R. 526, per Kent, J. p. 540.) It already appears that Ahern knew that the first note made by him was to be sold by B. & Co. He also knew, as his testimony shows, that it was to be sold in pursuance of a prior negotiation at a discount of twelve *per centum per annum*. He knew that the note was not business paper. He had been a large purchaser of paper of B. & Co., hence knew their mode of effecting sales of paper. It is to be inferred that he knew that in the purchase of paper, at a greater rate of discount than seven *per centum per annum*, the buyer usually exacted a representation that the paper sold was business paper, so that he might rely upon the fact,

if indeed the paper was such, or upon the estoppel if it was not. *Ibid.*

2647. Ahern adopted the results of B. & Co.'s acts and declarations. He received and has kept the fruits of their action with G. It is a fair inference that he falls within the second branch of the principal, which we have above stated, by which a person ratifies the acts of one acting as his agent, without authority at the time. The maxim, is, *omnis ratihabitio retrotrahitur et mandata priori acquiparetur*. Every ratification is retrospective, and is equivalent to a prior command. On this ground the plaintiff Ahern is to be held estopped from setting up usury in the first note. On the ground of a prior authority, he is to be estopped from setting up usury in the other two notes. *Ibid.*

2648. Drafts did not specify any place of payment; they were drawn and discounted in Canada. Defendant pleaded usury. *Held*, that the contract was to be governed by the laws of Canada, not of this State, and as by the laws of Canada usury is not a defence, the plea was not sustainable. *Merchants' Bank of Canada v. Griswold*, 72 N. Y. Ap. 472.

2649. It appears that the plaintiff's intestate, G., and the defendant lent to one J., the owner of a patent right, \$5,000, G. contributing \$1,000 and the defendant \$4,000. J. gave his note therefor to the defendant, payable in four months, and assigned to him the patent right as collateral security; and also gave him an agreement to convey an interest in the patent right for the benefit of himself and G. It is further agreed that they should be jointly interested in the loan, the collateral security and the agreement to convey an interest in the patent in the proportion of one to four. At the same time the defendant gave the note in suit to G. as evidence of his interest in the loan and security, with the express agreement that it should not be demanded or paid until the defendant should receive payment of the loan to J. At maturity J. did not pay his note, and with the consent of G. the patent right was sold by the defendant at auction to one T. for an amount equal to the sum, with interest, for which it was held as collateral security; and, at the request of G., the defendant took T.'s note for the amount, with the agreement that the defendant should hold it as the joint property of himself and G., and that a company should be formed to use and work the patent. This was in effect carrying out and executing the agreement previously made, that defendant should not be called upon to pay his note till J.'s note was paid, by substituting for payment in cash and interest to the same amount in the note given by T. This agreement is not inconsistent with terms of the note. It was made when the note was due, after the sale of the collateral security, when G. had the right to enforce the payment, and when the defendant could have paid it from the proceeds of the sale, instead of taking the note of T. It was a mode of payment agreed upon between the parties. *Ward v. Winship*, 12 Mass. 480. The agreement had a sufficient consideration in the fact that the defendant took the note instead of cash at G.'s request. A.'s, an additional agreement, was made at the same time, which was part of the foregoing, as to the use the defendant might make of the note, which he held for their joint benefit. And it was agreed that if the defendant would subscribe to the stock



of the company, and pay for the same with the note held for their joint benefit, the note in suit might remain, and the defendant should not be called upon to pay it, until the profits of so much of the stock as equitably represented the amount of the note should be sufficient to pay it. Relying on this agreement, the defendant afterwards subscribed to the stock, paid for the same with the note of T., instead of demanding a cash payment from T., and he has never received any profits whatever. G. having agreed to this method of payment, his administratrix cannot recover on this note, in violation of his agreement. *Gleason v. Saunders*, 121 Mass. 436.

2650. In an action on a non-negotiable promissory note made by the defendant to the plaintiff for \$4,000, dated the 7th December, 1872, it appeared that the note when made had no stamps, but that afterwards, in July, 1874, the plaintiff showed the note to her attorney, who informed her that it should have been stamped, and told her to affix stamps for the double duty. Through some misunderstanding she affixed only single stamps; and afterwards, in September, 1874, she sent the note to the attorney, when he, having discovered this, acting as plaintiff's agent, affixed the required double stamps. *Held*, that the plaintiff was not a "subsequent party to the note," or a "holder without becoming a party," within 33 Vic., ch. 13, § 12, so as to have enabled her to have affixed the double duty, and rendered the note valid, although she might have made it valid by affixing, as agent for the maker, stamps for the single day, when the note was delivered to her. *Escott v. Escott*, 22 C. P. 305. Adhered to, and *Wolley v. Hunton*, 33 U. C. R. 152, dissented from. *Held*, however, under 37 Vic. ch. 47, § 2, that the double stamps affixed to the note in September, after the passage of the Act, by the attorney as plaintiff's agent, rendered the note valid, for that the plaintiff then first acquired knowledge within the Act of stamps being necessary, it being found by the learned Judge that her previous omission to affix them was through error and mistake, and without any intention on her part to violate the law. *House v. House*, 24 Upper Canada Com. Pleas Rpts. 526.

2651. A. and H., a firm doing business in Hamilton, had a draft for \$1,200, accepted by B. at Montreal for their accomodation, falling due on the 27th of April. H., in order to obtain funds to meet it on the 26th of April, procured a draft on B. for \$600, to be discounted by the plaintiffs, telling them that it would be accepted, and the proceeds of it were placed to the general credit of the firm. This draft was sent to B. for acceptance, and H. on the same day wrote to him, inclosing the firm's check for \$1,200 on the Bank of Montreal, to take up the \$1,200 draft, and requested him to accept that for \$600. On the 27th B. duly paid the draft for \$1,200. On the 28th A. and H. had a difference, and A., hearing from H. that the firm were in difficulties, and that he intended using their funds in paying B. and another person, A. thereupon on the 29th drew out on the check of the firm their balance in plaintiffs' bank, consisting of the proceeds of the draft for \$600, of which A. knew nothing, and of other moneys, and handed it to their solicitor for the benefit of the creditors generally. Between the 25th and 29th both the debtor and creditor side of the firm's account had been dealt with, and the balance increased in their favor. H. on the 29th, on hearing what A. had done, wrote to B. that in consequence the

check sent him could not be paid, and B. then refused to accept the draft. On the 2d of May the firm became insolvent, and an assignee was appointed, to whom the solicitor handed over the moneys deposited with him. The plaintiffs, however, claimed the amount of the \$600 draft, contending that it was only discounted on the faith of its being accepted, and that as one of the partners had caused its non-acceptance by his letter to the drawee, there was a failure of consideration, and that they were, therefore, entitled to follow the money in the assignee's hands; but *held*, that they were not so entitled; that the case was the ordinary one of the discount of a draft on the belief that it would be accepted; and that the money formed part of the firm's general assets and passed to the assignee. *Canadian Bank of Commerce v. Davidson*, 25 Upper Canada Com. Pleas Rpts. 537.

2652. The payee of a joint and several note, at the request of the principal maker, the others having executed it for his accommodation, sent it to a bank for collection. Plaintiff, at the request of the principal, and upon the understanding that the note should be transferred to him, delivered to the bank the amount due thereon, and received the note. The money was forwarded by the bank to the payee, who received it without knowing but that it was a payment, after learning the facts, however, he retained the money. In an action upon the note, *held*, that, although the bank had no authority to sell, yet the retention of the money by the payee, after knowledge, and his omission thereafter to demand the note or assert title thereto, was a ratification of the sale; and that, at least in the absence of evidence that the sureties had been by information and a consequent relief that the note was paid, induced to remain quiet, and so had been injured, plaintiff was entitled to recover. *Coykendall v. Constable*, 99 N. Y. 309.

2653. B. Bros. & Co., carrying on business at Morristown and Syracuse in the State of New York, and also at Brockville in Ontario, and on the 11th October, 1872, at Morristown, signed a promissory note for \$500 at three months, payable at a bank at Syracuse to the order of C. F., a sleeping member of the firm, who at that time and until after the maturity of the note resided at Brockville. The note was indorsed by C. F., as also, but merely for the accommodation of the firm, by one H. H. and one A. B., both residents of Syracuse. The note so indorsed was handed to J. W. B., one of the firm, who resided at Brockville, and was there negotiated by him with a person named Harding at a rate exceeding 7 per cent., and Harding sold it to the plaintiff, who also resided in Brockville. The note was left by the plaintiff with a banker at Ogdensburg, N. Y., for collection, and at its maturity H. H. came over to Brockville and saw the plaintiff, who agreed to accept in renewal thereof the joint note of H. H., A. B., and the defendant at six months, which was accordingly made and deposited with Ogdensburg banker, who then gave up the previous note. *Held*, that the note of the 11th October, 1872, although drawn up and made payable in the State of New York, was in fact made and became a binding contract on all the parties thereto, on its being discounted at Brockville, and must therefore be deemed a Canada contract and governed by our laws; and that therefore the law of New York, which made void any note discounted at a higher rate of interest than 7 per cent., or any note in substitution thereof, did not apply. The plain-



tiff, therefore, having sued defendant on the last named note, *Held*, that he was entitled to recover. *Cloyes v. Chapman*, 27 Upper Canada Com. Pleas, 22.

2654. When a vendor, who has executed a deed to the land, assigns a note executed for the purchase money to a firm as collateral security for a claim of a smaller amount, it is competent for the surviving partner of the firm, and the administrator of the vendor, he having died in the meantime, to join as plaintiffs in a proceeding to enforce the vendor's lien. *Reynolds Adm'r, et al. v. West*, 32 Ark. Reps. 244.

2655. A. purchased a tract of land, executed his note for the purchase money and received a bond for title. B., at the request of A., paid the note and the vendor executed a deed to A.; at the same time and as a part of the same transaction, A. made his note to B. for the sum so paid and executed a mortgage on the land to secure it. *Held* that no new lien was created, there was merely a transfer of the original lien, and a change in the form of the security. *Blevins v. Rogers*, 32 Ark. R. 258.

2656. The grantor of certain real estate, which was conveyed to the grantee in pursuance of a contract made with the grantor by the agent of the grantee, accepted from the agent, in good faith, as genuine, a false and forged mortgage on such real estate, purporting to have been executed by the grantee, to secure a promissory note of the agent for the unpaid balance of the purchase money. Foreclosure of the mortgage having been defeated on the ground of its forgery, though judgment on such note was rendered against the agent, who was insolvent, the grantor brought an action against the grantee, to enforce a lien against said real estate for such purchase money. *Held*, on demurrer to evidence tending to establish the foregoing facts, that the plaintiff is entitled to the lien. *Fouch v. Wilson*, 60 Ind. 64.

2657. Where the purchase money of land is made payable in several instalments evidenced by promissory notes due at different times, the vendor, being the holder of the notes, may enforce his lien against the land when one or more of such notes have become due, for the payment thereof without waiting till all of the notes have matured. *Furr v. Morgan*, 55 Miss. 389. Notice of non-payment to McE., an indorser, both being dated back to July third. In an action to recover damages for negligence, *held*, that as the note was made payable at defendant's bank, and the funds not being there to meet it when it fell due, a demand for payment was not necessary, and all that was required of defendant was to notify the indorser of non-payment; that notice having been sent on the next business day it was in time; and that if the mistake occurred as alleged, defendant was not liable; but the presumption was that the note was not paid by mistake, but voluntarily on the credit of the maker, in which case the payment could not be retracted, it discharged the indorser and so rendered defendant liable. *Whiting v. City Bank of Rochester*, 77 N. Y. 363.

2658. The only evidence to sustain the allegation of mistake consisted of a telegram from defendant's assistant cashier to plaintiffs, stating that defendant had remitted for the note by mistake, and a letter of a similar purport with a statement that the note had been protested and the indorser notified. Evidence was given by plaintiffs to

the effect that the note was not protested, or notice of non-payment mailed, until after defendant had learned of the failure of U. *Held*, that the fact that there was a mistake was not so conclusively proved as to justify the court in refusing to submit the question to the jury. *Whiting v. City Bank of Rochester*, 77 N. Y. 363.

**2659.** The holder of several past due promissory notes, against the same parties, may bring separate actions upon each; and a recovery in one, and satisfaction of the judgment, is not a bar to the other actions. The fact that the notes were given upon settlement of one and the same demand does not make each a part of the original demand, so as to compel the bringing of a single action upon all of the notes. *Nathans v. Hope*, 77 N. Y. 420.

**2660.** The holder of a promissory note owes an accommodation indorser no active duty to secure or protect his interest. *Smith v. Erwin*, 77 N. Y. 466.

**2661.** Where a promissory note is made in this State, by a resident thereof, bearing date here, by its terms payable at some place in the State, with no rate of interest specified, and no intention of the maker existing that it will be taken elsewhere for discount, if it is first negotiated in another State, at a rate of interest lawful there, but greater than that allowed by the usury laws of this State, it is invalid. *Dickinson v. Edwards*, 77 N. Y. 573.

**2662.** Judgment on a note or contract operates as a merger of it; and when the judgment is binding personally it can be introduced in evidence, and relied on as a bar to a second suit on the note. *Eldred v. Bank*, 17 Wall. U. S. 545.

**2663.** Under the provision of the statute (1 R. S., 768 § 5), providing that promissory notes made payable to the order of the maker, or of a fictitious person, if negotiated by him, shall have the same validity, as against him and "all persons having knowledge of the facts, as if payable to bearer," the facts of which a person must have knowledge in order to give the note efficacy as against him, as if payable to bearer, are simply that the note is payable to the order of the maker or of a fictitious person. *Irving Nat. Bank v. Alley*, 79 N. Y. 536.

**2664.** A note payable to the order of the maker, therefore, as against an accommodation indorser having knowledge of this fact, is to be considered as if payable to bearer; and is valid, although negotiated without the indorsement of the payee. *Irving Nat. Bank v. Alley*, 79 N. Y. 536.

**2665.** It seems, that such an indorser, as against a *bona fide* holder would be estopped from denying knowledge for the purpose of defeating the note; as the fact appears in the note, and he will not be permitted to say that he did not read or know the contents of the instrument signed by him. *Irving Nat. Bank v. Alley*, 79 N. Y. 536.

**2666.** Plaintiffs, in good faith and without notice of any equities, received from the payee, in exchange for two promissory notes which they surrendered absolutely and unconditionally, a note made by defendants. In an action thereon, *held*, that the plaintiffs were *bona fide* holders for value and so that it was no defence that the note was executed for the accommodation of the payee and had been fraudulently diverted from the use intended. *Nickerson v. Ruger*, 84 N. Y. 675.



2667. Sufficiency of consideration for promissory note. *First Nat. Bank v. Tisdale*, (Mem.) 84 N. Y. 655.

2668. The alteration of the date in any commercial paper—though the alteration *delay* the time of payment—is a material alteration, and if made without the consent of the party sought to be charged, extinguishes his liability. The fact that it was made by one of the parties signing the paper before it had passed from his hands, does not alter the case as respect another party (a surety), who had signed previously. *Wood v. Steele*, 6 Wall. U. S. 80.

2669. The point that in action on lost note, bond required by statute was not given, cannot be raised for first time on appeal; it must be presented by exception. *Fordham v. Hendrickson*, (Mem.) 84 N. Y. 654.

2670. The maker of a promissory note, in an action thereon by a transferee, cannot assail plaintiff's title on the ground that the transfer was made in fraud of the creditors of the payee; the transfer can only be assailed on that account by the creditors or some one representing them. *Sullivan v. Bonesteel*, 79 N. Y. 631.

2671. Promissory notes given for a balance found due on settlement in a transaction itself forbidden by statute and illegal, or for money lent to enable a party to pay bills which the person taking the promissory notes had himself assisted, in violation of statute, to issue and circulate, cannot be enforced. *Brown v. Turkington*, 3 Wall. U. S. 377.

2672. Where a negotiable promissory note, obtained from the promisor by fraud, has been transferred to a third party before its maturity, the burden of proof is upon him to show that he purchased it for value in good faith; and, to determine this, all the attendant circumstances of the transaction are to be considered. *Sullivan v. Langley*, 75 Mass. 437.

2673. In an action upon a promissory note, where the defence was usury, *i. e.*, that the note was executed by defendant for the accommodation of the payee and was transferred by him at a usurious rate of interest, there was no finding, or request to find, that the note was accommodation paper, upon which question the evidence was conflicting, but the referee found that it was duly made and delivered to the payee and by him duly indorsed to plaintiff before maturity; to these findings there were no exceptions. *Held*, that this court had no right, for the purpose of reversing the judgment, to find that the note was not business paper; that, *prima facie*, the note was given for value, and the burden was upon defendant to prove the defect alleged. *Bayliss v. Cockcroft*, 81 N. Y. 363.

2674. The bonds and treasury notes of the United States, payable to bearer at a definite future time, are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. *Vermilye & Co. v. Adams Express Co.*, 21 Wallace, U. S. 138. Where such paper is overdue, a purchaser takes it subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity. *Ibid*.

2675. No usage or custom among bankers and brokers dealing in such paper can be proved in contravention of this rule of law. *Ibid*.

2676. It is their duty, when served with notice of the loss of such

paper by the rightful owner, after maturity, to make memoranda or lists, where the notice identifies the paper, to enable them to recall the service of notice. *Ibid.*

2677. A purchaser of negotiable paper for value, without notice, will not be bound by any secret equity therein in favor of a third person not connected with the legal title to the paper. Where a trustee assigns negotiable paper in violation of the trust, the *bona fide* assignee will take it free from the trust, whether he bought it before or after maturity, and whether payable in this State or elsewhere. The anti-commercial statutes of this State apply only to defences between those connected with the legal title, and not to those asserting equities in such paper. The same is true as to that principle of law merchant which requires the purchase to be made before maturity. *Hibernian Bank v. Everman, et al.*, 52 Miss. 500.

2678. A partner who held notes which, both by law and contract with his copartner, he was bound to apply to the payment of the liabilities of the firm, fraudulently transferred and converted them to his own use. By subsequent transfer they came into possession of the Hibernian Bank. The injured copartner for himself and the firm creditors, sought to have them applied to the firm liabilities. *Held*, that there being nothing on the face of the notes to indicate their fiduciary character, the bank acquired good title. *Ibid.*

2679. The doctrine of *lis pendens* cannot apply to a party purchasing negotiable paper beyond the jurisdiction, even if it applies to a purchase within the State. It is a mere representative of value and has no *situs*, and unless impounded in the hands of a receiver, or otherwise placed under the control of the Court, an innocent purchaser cannot be affected by notice of the litigation. *Hibernian Bank v. Everman, et al.*, 52 Miss. 500.

2680. A purchaser of negotiable paper, though a broker, is not a lender of money on it, and if he purchase honestly and without notice of equities—there being nothing on the face of the draft to awaken suspicion—he can recover the full amount of the paper. *Tilden v. Blair*, 21 Wall. U. S. 241.

2681. The assignment of a negotiable note before its maturity, raises the presumption of a want of notice of any defence to it; and this presumption stands till it is overcome by sufficient proof. *Carpenter v. Longan*, 16 Wall. 271.

2682. A *bona fide* holder of negotiable paper purchased before its maturity upon an unexecuted contract, on which part payment only had been made when he received notice of fraud, and a prohibition to pay, is protected only to the amount paid before the receipt of such notice. *Dresser v. Missouri & Iowa Railway Construction Co.*, (3 Otto.) U. S. Rpt. 92, 93.

2683. The holder of a note which is secured by mortgage may proceed at law and in equity at the same time, until he obtains actual satisfaction of the debt. *Ober v. Gallagher*, 93 U. S. 199.

2684. Where the declaration against the assignor of a promissory note upon his contract of assignment made in Illinois avers that a suit against the maker of the note would have been unavailing, and the defendant takes issue thereon, the record of an adjudication in bankruptcy against the maker of the note before suit could have been



brought thereon is not only competent, but conclusive evidence for the plaintiff. *Wills, et al. v. Claflin, et al.*, 92 U. S. 135.

**2685.** Where a note, deposited in bank for collection by its owner, was paid by a person not a party thereto, with the intention of having it remain as an existing security, and the money so paid was received by the owner of the note,—*Held*, that such person thereby became the purchaser of the note, and its negotiability remains after as before maturity, subject to the equities between the parties. *Dodge, et al. v. Freedmans Savings & Trust Co.*, 93 U. S. 379.

**2686.** In law, a person with whom a note is deposited for collection is the agent of the holder, and not of the maker. The maker has no interest in it, except to pay the note. Failing to do this, he leaves it to be dealt with as others interested may choose. *Ibid.*

**2687.** A note payable to bearer, though overdue and dishonored, passes by delivery the legal title to the holder, subject to such equities as may be asserted by reason of its dishonor, and any one disputing the title of the holder of such paper takes the burden of establishing, by sufficient evidence, the facts necessary to defeat it. *National Bank of Washington v. Texas*, 20 Wall. U. S. 72.

**2688.** The doctrine applied to certain of the bonds known as the "Texas Indemnity Bonds." *Ibid.*

**2689.** A surety is not discharged by a contract between his principal and their common obligee which does not place him in a different position from that which he occupied before the contract was made. *Roach v. Summers*, 20 Wall. U. S. 165.

**2690.** Indorser of a promissory note, though an indorser for accommodation only, is not a "security" within the meaning of that word as used in a statute of Arkansas, which declares that any person bound as "security" for another on any bond, bill, or note, may require the person having the right to sue on the instrument, to proceed against the principal under penalty of the surety's being exonerated. *Ross v. Jones*, 22 Wall. U. S. 576.

**2691.** Consideration need not be alleged. The omission of the words "for value received" in a promissory note, is not material. *Ibid.*

**2692.** A description of the note is sufficient without an averment of the consideration. *Underhill v. Phillips*, 17 N. Y. Sup. Ct. Reps. 591.

**2693.** Defendant executed a power of attorney, by which he appointed one Packard his "true and lawful attorney for me and in my name, and place, and stead, to draw and indorse any check or checks, promissory note or notes on any bank in the city of New York, in which I have an account, and especially in the Irving National Bank of said city, and to do any and all matters and things connected with my account in said Irving National, or any other bank in said city, which I myself might or could do, etc." *Held*, that Packard was not authorized thereby to draw or indorse any check or note, except such as were payable at a bank in which the defendant had an account. 17 N. Y. Sup. Ct. 593.

**2694.** Possession of a note is *prima facie* evidence of ownership, and in an action thereon this title will be respected until denied by pleading. *Crosthwait, etc. v. Misener*, 13 Bush, Ky. 543.

**2695.** The alteration of a writing, after delivery, by a third person, without the knowledge or consent of the obligee, does not render the contract void, or release the obligors from liability. *Blakely v. Johnson*, 13 Bush, Ky. 197.

**2696.** A material alteration of a completed note by the principal obligor, after it had been signed by his surety, and without his consent or knowledge, before its delivery to the payee, renders it void as to the surety. The words "interest to be paid semiannually," were added to the note in this case, but under such circumstances as not to entitle the surety to recover back the amount of the note and interest paid by him, without any knowledge of the fact that the note had been altered by the principal after the surety signed it. *Blakely v. Johnson*, 13 Bush, Ky. 192.

**2697.** If, on the transfer of negotiable paper, an indorsement is omitted through accident, mistake or fraud, a good title will pass in equity by mere delivery. *Hughes v. Nelson*, 29 N. J. 547.

**2698.** An instrument in the following form is not a negotiable instrument: "\$100. Neosho, Mo., Aug. 29, 1874. — after date, — promise to pay to the order of — dollars, for value received, negotiable and payable, without defalcation or discount, with ten per cent. interest thereon from maturity, till paid; and if said interest shall remain unpaid for the time of one year from the maturity of this note, then the same to become as principal and to bear the same rate of interest as principal, and to be compounded annually; and we do each and severally waive any and all exemptions under and by virtue of any execution, exemption, homestead or stay laws of the State of Missouri, or that of any other State; and we do each further promise and agree to pay a reasonable attorney's fee for the bringing suit in collection after the same shall become due, payable at the Newton County Bank of Samstag & Stein." See *First Nat. Bank of Trenton v. Gav*, 63 Mo. 33. And the indorsement by the payee simply makes him liable as assignor to pay after the exercise of due diligence by the holder, and failure to collect from the maker after suit, or in case of the insolvency or non-residence of the maker, so that a suit would have been unavailing. *Samstag, et al. v. Conley, et al.*, 64 Mo. 476.

**2699.** Bills or notes bearing the stamp of a bank may still be put in circulation. *Barthe v. Armstrong*, 5 R. L. 213; C. C. 1869.

**2700.** The payee of certain promissory notes, having assigned the same to another by a blank indorsement, executed to the assignee, to secure the payment of such notes, a mortgage on certain real estate, conditioned that if the payee "shall pay said notes according to their tenor and effect, or cause the same to be paid, this mortgage shall be void," etc. *Held*, in an action upon such notes, and to foreclose such mortgage, by the assignee, against the maker and payee, that the plaintiff is entitled to personal judgment against both defendants for the amounts due on such notes, the foreclosure of such mortgage against the payee and execution over against the maker for any part of such judgment remaining unsatisfied by the sale of the mortgaged premises. *Held*, also, that the liability of such payee is primary, and not merely that of an indorser. *Robertson v. Cauble*, 57 Ind. 420; also, *Zekind v. Newkirk*, 12 Ind. 544; *Burnham v. Gullentine*, 11 Ind. 295; *Watson v. Beabout*, 18 Ind. 281.



**2701.** Defendant gave to Hevner a negotiable note in payment of a patent which defendant alleged was a fraud; plaintiff being about to discount the note, defendant told him not to buy it, that Hevner had promised when the sale was made that he would not negotiate it; that if plaintiff bought it he would buy a lawsuit; no notice was given to plaintiff that the sale was fraudulent. Plaintiff having discounted the note, *Held*, in a suit on it, that these facts were no defence, although Hevner had committed a fraud on defendant in the sale. A parol agreement, although made at the time of making negotiable paper, that the payee will not negotiate it and would renew it, etc., is admissible to vary the effect of the paper. *Heist v. Hart*, 73 Penn. 286.

**2702.** A negotiable instrument, payable to bearer, or indorsed in blank, produced by a transferee suing to recover its contents, is, when received in evidence, clothed with the *prima facie* presumption that he became the holder of it for value at its date, in the usual course of business, without notice of anything to impeach his title. *Collins v. Gilbert*, 94 U. S. 753.

**2703.** The title of a *bona fide* holder for value of an accepted draft, indorsed in blank, is not affected by the fact that the party from whom he received it before its maturity had possession of it for certain purposes and misappropriated it. *Ibid.*

**2704.** Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or in doing what he would not have done. *Railroad Company v. Jones*, 95 U. S. 439.

**2705.** A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void, for want of power in the maker to issue it, or its circulation is by law prohibited by reason of the illegality of the consideration. Municipal bonds, payable to bearer, are subject to the same rules as other negotiable paper. Though he may have notice of infirmities in its origin, a purchaser of a municipal bond from a *bona fide* holder, who obtained it for value before maturity, takes it as freed from such infirmities as it was in the hands of such holder. A purchaser of negotiable securities before their maturity, whatever may have been their original infirmity, can, unless he is personally chargeable with fraud in procuring them, recover against the maker the full amount of them, though he may have paid therefor less than their par value. *Cromwell v. County of Sac.*, 96 U. S. 51.

**2706.** Where the title of the original holder of negotiable instruments, which are infected with fraud, invalidity, is destroyed, that of every subsequent holder which rests on that foundation, and no other, falls with it. *Commissioners of Marion County v. Clark*, 94 U. S. 278.

**2707.** Where the first indorser, without notice of any prior equities between the original parties, purchases, for value, a negotiable instrument, the second indorsee, who acquires it before it is due, and for value, takes a good title, although he had notice of such equities. *Ibid.*

**2708.** Bonds issued, pursuant to legislative authority, by a municipal corporation in aid of a railroad company, are negotiable instruments. *Ibid.*

**2709.** A promissory note in the ordinary form, signed by a mar-

ried woman, made payable to the order of her husband, and indorsed and presented for discount by him, is *prima facie* a nullity; to give it vitality and effect it must be made to appear by evidence *aliunde* the instrument, that it was made in her separate business or for the benefit of her separate estate. The fact that she owns separate estate is not alone sufficient to give it validity. Accordingly, *Held*, in an action upon two such notes against the maker, that a charge to the jury to the effect that defendant gave the notes to her husband with a view of having them discounted was calculated to convey the impression that she was the principal, and whatever was done was for her benefit, was an error. *Second Nat. Bank v. Miller*, 18 Sickels, N. Y. 634.

**2710.** When it appears from the complaint that one of the two defendants made the note in suit in favor, but not to the order, of the plaintiff, the payee therein named; that the other defendant indorsed it, and that it was thereupon delivered to the plaintiff, *Held*, that, inasmuch as such an indorsement before delivery imparts the liability of a maker, these averments, taken together, must be deemed equivalent to an allegation that the two defendants made the promissory note, and that both are jointly liable as makers thereof. Although not negotiable, the instrument is a promissory note, and as such imparts a consideration, though none is expressed. Want of consideration is matter of defence.

**2711.** A question of pleading must be determined according to the course of practice prevailing in the courts of this State, although the obligation sued upon, *i. e.*, a promissory note, was made in another State. In the absence of proof to the contrary, it will be presumed by the courts of this State that the law of another State in regard to a subject-matter before the court, is the same as the law in this State. *Paine v. Noelke*, 53 Howard's N. Y. 273; also, 54 Ind. 333.

**2712.** A promissory note, in form negotiable, is not rendered non-negotiable by being made payable at one or two years after date, nor by the statement on its face that it was given for and secured by a lien on real estate. *Duncan v. Louisville*, *etc.*, 13 Bush, Ky. 378.

**2713.** Note payable one day after date becomes due on day after it was made, and cannot be sued until the day following. If such note was not made on the day of its date, it cannot be sued until the second day after it was in fact made. *Ruefle v. Moore, et. al.*, 58 Ga. 94.

**2714.** The fact that notes are given for a larger sum than was agreed by the parties to be due for land purchased, does not render them void, but goes to the consideration, partially, and there may be a recovery *pro tanto*. *McGord v. Crooker*, 83 Ill. 556.

**2715.** When one signs an obligation describing himself as principal, he renounces his right as surety, and parol evidence showing that his agreement was that of surety only, and that his liability was extinguished by reason of an extension granted to the principal without his knowledge, is inadmissible, as varying the terms of his written contract. And more especially is this true where he expressly stipulates in the instrument that no extension of time shall affect his liability. And it is immaterial in such case that the instrument signed is a note and not a specialty. *McMillan v. Parkell*, 64 Mo. 286; *Claremont Bank v. Wood*, 10 Vt. 582; *Picot v. Signiago*, 22 Mo. 587.

**2716.** A promissory note made payable a specified number of



months after date, without grace, falls due on the same day of the month as that of its date. *Roehner v. Knickerbocker Life Ins. Co.*, 18 Sickels, N. Y. R. 160.

**2717.** Equity may entertain a bill to rectify a written instrument drafted, by accident, mistake, or fraud, otherwise than according to the agreement of the parties, but if a person deliberately execute a particular instrument, such as a promissory note, intending it to be what it is in reality, parol testimony is inadmissible, either at law or in equity, to change or alter its legal effect. *Bridges v. Robinson*, 2 Tenn. Eq. 720.

**2718.** The statute (Gen. Statutes, 343, § 2) which provides that any promissory note payable on demand, which remains unpaid four months from its date, shall be considered overdue and dishonored, does not affect the rights of the original parties to the note, but only those of third parties, as indorsers, guarantors or purchasers. *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300.

**2719.** The Michigan Statute (Comp. L., § 1565-6) imposing conditions on the transfer of patent rights by requiring notes given therefor to show it, and making it a misdemeanor to take or transfer them otherwise, is unconstitutional, as impairing rights that are regulated and protected by Congress. Fraud is not to be presumed against a patent right note, but must be proved. *Cranson v. Smith*, 37 Mich. 309.

**2720.** To a declaration on a promissory note, a defence that the note was made in a foreign State, upon a consideration which was void under a law of that State, should be specially pleaded, and it cannot be received under the general issue. *Held*, that the issue was immaterial. *Roop v. Delahaye*, 2 Colorado, 307.

**2721.** The plaintiffs took the individual note of B., on account of the goods, but it was not given or taken as payment of the account. *Held*, that this did not discharge the liability of the corporation. B. having gone into bankruptcy, the plaintiffs presented the note against his estate, and received a dividend upon it. *Held*, they might show that they did this under the advice of legal counsel, and upon an opinion given that it would not prejudice their claim against the corporation. *Northford Rivet Co. v. Blackman M'fg Co.*, 44 Conn. 183.

**2722.** Where a promissory note for dollars, made in Georgia, in January, 1863, is shown to have been solvable in Confederate treasury notes, the sum thereby payable in actual money must be ascertained by the value in coin or legal currency of the United States, at the time when and the place where the note was made, of such treasury notes, equal in nominal amount to the number of dollars specified. *Stewart v. Salamon*, 94 U. S. 434.

**2723.** Where a payment is indorsed in the same monetary terms which are used in the note itself, the presumption is that it was intended to be credited in the same circulating medium. If the parties intended otherwise, some proof on the subject should be presented. *Ibid.*

**2724.** Accordingly, where a promissory note for dollars, shown to be solvable, at the time it was made, in Confederate treasury notes, had a receipt for a specified number of dollars indorsed upon it, it was *held* that, in the absence of proof, the principal designated on the face of

the note was reduced only by the amount specified in the receipt.  
*Ibid.*

**2725.** Where, at the time of making and indorsing a promissory note, a written contract in relation thereto is entered into by the parties, parol testimony varying or contradicting its terms is not admissible. *Brown v. Spofford*, 95 U. S. 474.

**2726.** In the absence of proof to show when promissory notes were transferred by the payee, the law presumes that they were, when underdue, taken in good faith by the transferee, without notice of any infirmity attaching to them, and he is entitled to the benefit of the deed of trust given to secure them. *New Orleans Canal and Banking Co. v. Montgomery*, 95 U. S. 16.

**2727.** In a suit upon a promissory note, the court below charged the jury that if the defendant, without making any statement of his intention in so doing, wrote his name on the back of the note before its delivery to the payee, he is presumed to have done so as the surety of the maker, for his accommodation, and to give him credit with the payee, and that, if such presumption is not rebutted by the evidence he is liable on the note as maker. *Held*, that the charge was not erroneous. *Good v. Martin*, 95 U. S. 90.

**2728.** In action by a savings bank on a promissory note, against B., as second indorser, it appeared that the note, which purported on its face to be secured by a mortgage of real estate, was payable to A., or order; that A. borrowed money of B., indorsed the note to B.'s order, and delivered it to him with an assignment of the mortgage and note, as collateral security; that afterwards A. paid B. the money borrowed, and B. wrote his name on the back of the note under the name of A. and delivered it to him, and also executed to him an assignment of the mortgage and note; that A. thereupon, and before the maturity of the note, delivered it to the plaintiff for a valuable consideration, and executed to it an assignment, in which A. was described as mortgagee named in, and assignee of, the mortgage; that A. was then a trustee of the plaintiff bank and one of its conveyancers, but took no part in the management; that the treasurer of the bank did not notice the signature of B. when he took the note and relied on the mortgage alone as security. B. testified that he did not intend to indorse the note, but only to assign it to A. Demand was made on the maker of the note and due notice given to B. *Held*, that, on these facts, the action might be maintained; and that no fact appeared which would warrant a jury in finding for the defendant. *West Boston Savings Bank v. Thompson*, 124 Mass. 506.

**2729.** In an action by the payee on a promissory note, signed on the back thereof, by the defendant before delivery, oral evidence is inadmissible to show that the payee agreed to treat him as an indorser, and not as an original promisor. *Allen v. Brown*, 124 Mass. 77.

**2730.** A person, not the payee, who before the St. of 1874, c. 404, wrote his name upon the back of a negotiable promissory note at its inception, and before its delivery, is liable as an original promisor; and parol evidence is inadmissible to show that he wrote his name upon the note, not with the intention of adding his personal responsibility to its security, but merely in approval of it as the president of a company; or that the treasurer issued the note in violation of a by-law of



the company; the plaintiff, the payee of the note, having no knowledge of the facts. *Gilson v. Stevens Machine Co.*, 124 Mass. 546.

**2731.** If a promissory note is made payable on condition that a proceeding pending in the courts is decided in favor of the payee, and the proceeding is decided against him, the note cannot be enforced. *Frisbie v. Moore*, 51 Cal. 516.

**2732.** A note on which the interest is payable quarterly at the legal rate, is not usurious. *Mowry v. Shumway*, 44 Conn. 493; also, *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 503; and *Rose v. Bridgeport*, 17 Conn. 247; and *Brooks v. Holland*, 21 Conn. 388.

**2733.** A rule which would require the maker of a note to act after its maturity, and before payment, with reference to the equitable rights attaching to it in the hands of every one who may have had it by assignment, would be destructive of the negotiability of such instruments. *Long v. Walker*, 47 Texas, 173.

**2734.** Payment of a note made by partners is received by an agent in Confederate currency, upon condition that if the principal refuses to receive it, it is to be returned; and a receipt is indorsed on the note and delivered to one of the partners. The principal declines to receive it, and the agent returns the currency to another partner, who gives the partnership promise to pay the amount of the note in the new issue of Confederate notes, which the principal was willing to receive, and this is received by the principal. *Held*, 1. The delivery of this second promise and its reception by the principal is not a discharge of the note, unless it was so intended and agreed by the principal; and this must be clearly shown by the makers of the note. *Levis, et al. v. Davisson's Ex'r*, 29 Grattan (Va.) 216.

**2735.** The delivery of the note by the agent to one of the partners, and its cancellation and possession by him, will not prevent an action upon it by the principal. *Ibid*.

**2736.** In an action by a bank against an indorser of negotiable notes, which were discontinued in Alexandria, and fell due during the war, when the indorser was within the Confederate lines, to prove notice of protest to the indorser within a reasonable time after the war ceased, the plaintiff offered in evidence a resolution of the stockholders, adopted at a meeting held on the 18th of July, 1865, at which the indorser was present at a previous period of the meeting, though it did not appear he was present when the resolution was adopted, by which those notes and others paid by the maker at a branch of the plaintiff's bank within the Confederate lines, are declared still to be due to the bank. *Held*, 1. There being no proof that the indorser had any knowledge of the resolution, it was not due notice to him of the dishonor of the notes.

**2737.** 2. The knowledge of non-payment of a protested note is not sufficient to bind the indorser. He must have notice that he is looked to for payment. 3. The resolution having been adopted July 18th, 1865, at least two months after communication had been opened between the bank and the indorser, it was not in time, if it had been sufficient as a notice. *Bank of Old Dominion v. McVeigh*, 29 Grattan (Va.) 546.

**2738.** In suit on the following note, to wit: "Three months from date promise to pay to order of A. and B. fifteen dollars, etc., etc., with

interest at ten per cent. per annum, and if interest be not paid annually to become as principal," etc. (Signed) "P. H. Ammerman, executor of last will of James Johnson, deceased," it was *held* that as the instrument contained no words showing an intention to charge the estate, the terms "executor," etc., should be treated merely as *descriptio personæ*; that the fact of payment to be made at a future day, with the interest named, might of itself be sufficient to show a personal undertaking of the executor; that the note of itself imported a consideration, and that it devolved on the maker and competent for him, if he designed to set up that defence, to show that as his individual contract it was without consideration, and that the payee agreed to look only on the estate. And in such case, where the consideration of the note accrued after the death of the testator, the administrator will in the first instance be liable *de bonis propriis*, but he may reimburse himself out of the assets of the deceased.

**2739.** An administrator can maintain an action in his own name on a note made payable to him as administrator or executor, the official words being treated as mere surplusage or as *descriptio personæ*. *Rittenhouse v. Ammerman*, 64 Mo. 197.

**2740.** An instrument in the form of a promissory note, beginning, "We as trustees, but not individually, promise to pay," and signed "A., B. and C., trustees," purported on its face to be secured by mortgage of real estate. A., B. and C. were trustees of a land association, and purchased of the promisee a parcel of land, the deed of which ran to them as trustees of the association, and set forth their powers. They mortgaged the land to the grantor, and gave the above instrument, secured by the mortgage, in part payment of the purchase money. *Held*, in action against the makers of the instrument, by an indorsee, who took it after maturity, that they were not personally liable thereon. *Shoe & Leather National Bank v. Dix*, 123 Mass. 148.

**2741.** It is a good consideration for a promissory note that the promisor gave it at the request and for the benefit of his son, who was in the employ of the promisee, to be applied by the latter toward the payment of a defalcation of the son, the note being so credited to the son on the books of the promisee. *Popple v. Day*, 123 Mass. 520.

**2742.** It is a good consideration for a promissory note given by the promisor, who was an assignee of a bankrupt, toward the payment of moneys received and misused by him, that the promisee, who was his co-assignee, refrained from pressing proceedings against him instituted to protect the interests of the creditors. *Abbott v. Fisher*, 124 Mass. 414.

**2743.** In assumpsit on a promissory note by the bearer against the maker, it appeared that it was drawn payable to the wardens and vestry of a certain church, or bearer, and there was evidence tending to show that after it was executed and delivered to the corporation, and before it passed into plaintiff's possession, the corporation became in fact extinct by the removal of its officers and members. It did not appear that the corporation ever parted with the title to the note, and plaintiff showed no title beyond mere possession. *Held*, that if the corporation did become extinct, the defendant was not thereby discharged from his liability on the note, but that title thereto vested somewhere, and that plaintiff, having, so far as it appeared, lawful possession of the



note, might maintain an action thereon in his own name, and recover for the benefit of the holder of the legal title. *Hyde v. Lawrence*, 49 Rowell, Vt. 361.

**2744.** A person who receives two promissory notes upon an agreement to release a demand upon their payment at maturity, is not debarred from his original cause of action, by having one note discounted and taking it up when protested for non-payment, and by prosecuting the other to judgment in the name of a friend, but for his own benefit, nothing being received by him upon either note, and the discounted note and an assignment of the judgment being tendered by him in court. *Lord v. Bigelow*, 124 Mass. 185.

**2745.** If a promissory note, payable to the order of A., is given by him to the maker, it is not essential to the validity of the gift that the payee should indorse it. *Hale v. Rice*, 124 Mass. 292.

**2746.** In an action on a joint and several note, signed by one person as principal and another as surety, and payable to the order of a bank, upon which was the memorandum, "F. & L. bonds as collateral," "F. & L. notes," being in fact deposited as security, it appeared that the treasurer of the bank, in reply to an inquiry by the surety, "if the F. & L. bonds were deposited with the note?" replied that they were. *Held*, that the surety was not discharged. *Fitchburg Savings Bank v. Rice*, 124 Mass. 72.

**2747.** If land mortgaged to secure a promissory note is sold under a power contained in the mortgage, and brings less than the amount of the note, an action may be maintained on the note for the balance due. *Wing v. Hayford*, 124 Mass. 249.

**2748.** The alteration of a promissory note by one of the makers, by increasing the amount for which it was made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as do not consent thereto, even in the hands of a *bona fide* holder for a valuable consideration. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196.

**2749.** A negotiable promissory note is, under the act of April, 1873, governed by the law merchant, and an indorsee for value before maturity in due course of business, without notice, takes it free from any set-off in favor of the maker, or against the assignor. The provision of section 570, Gantt's Digest, that all blank assignments shall be taken to have been made on such a day as shall be most to the advantage of the defendant, merely changes the former rule of presumption to be applied in the absence of evidence, and it is competent for the plaintiff to prove the actual date of the assignment. *Clendenin v. Southerland*, 31 Ark. 20.

**2750.** A waiver of demand and notice upon a promissory note is as effectual after as before the maturity of the note. *Rindge v. Kimball*, 124 Mass. 209.

**2751.** In an action against a surety on a promissory note, it is no defence that the holder delayed enforcing the note against the maker, and that the surety was thereby injured. *Allen v. Brown*, 124 Mass. 71.

**2752.** A memorandum of "F. & L. bonds as collateral," on a joint and several note, signed by one person as principal and another as surety, is not notice to the payee of any agreement between them that

the principal would pledge the bonds named, nor a condition precedent to the liability of the surety that the payee should receive the bonds named as security. *Fitchburg Savings Bank v. Rice*, 124 Mass. 72.

**2753.** A., through fraud, obtained from B. a promissory note signed by B. and payable to the order of C., forged the indorsement of C. and got the note discounted at a bank. On the maturity of the note B. paid it to the bank. *Held*, that B. could maintain an action against the bank for money had and received, although the bank acted in good faith in taking the note. *Carpenter v. Northborough National Bank*, 123 Mass. 66.

**2754.** When a promissory note, based on an insufficient consideration, has been obtained from a person under the influence of liquor at the time of its execution, and enfeebled in mind and body by long continued disease and drunkenness, a presumption of fraud arises, which must be countervailed by proof of a fair consideration, and fair and honest dealing on the part of him who seeks to enforce payment of the note. *Holland v. Barnes*, 53 Ala. 83.

**2755.** Defendant signed a note with L., as it appeared from the force of it as a principal with, but in fact as security for him. In order to procure it to be discounted, L. took the note to plaintiff, and asked him "if he would sign it with him, and defendant," and plaintiff signed it, adding to his signature the word surety, supposing from the manner in which he was asked to sign it, and from its appearance, that he was signing as surety for both L. and defendant, and regarded them as principals. The note was discounted, and, upon its maturity, L., having negotiated with the bank for renewal, drew another like it, procured defendant's signature thereto as before, and sent it to plaintiff, requesting him to sign and deliver it to the bank, and take up the former note, which he did, adding to his signature, as before, the word surety. *Held*, that plaintiff was surety for, and not co-surety with defendant. *Sherman v. Black*, 49 Rowell, Vt. 198.

**2756.** One who puts his name on the back of a note at the time it is made and before it comes to the hand of the payee, there being nothing to show with what intention, is liable as maker. The opinion of the court at the former term in this cause, on this point, reexamined and affirmed. *Good v. Martin*, 2 Colorado, 218.

**2757.** In an action on a promissory note against one who is charged as maker, upon the ground that he indorsed the note at the time it was made, and before it was delivered to the payee, the circumstance that he did not participate in the consideration, does not tend to explain or rebut his liability as maker. *Ibid.*

**2758.** Promissory note is secured by a chattel mortgage, executed by the maker of the note; in the absence of a demand, or any proceeding by the payee equivalent to a demand, the maker is entitled to the whole of the business hours of the last day of grace to pay the note, and is not in default until the expiration of that time. *Daly v. Proetz*, 20 Minn. 411.

**2759.** Plaintiff and defendant were indorsers of a promissory note whereof M. was payee. The makers became bankrupt, and plaintiff paid the note, which M. had procured to be discounted. The makers compounded with their creditor, and plaintiff received his *pro rata* portion, and with the advice and consent of defendant, and upon



his agreement that his liability should not be thereby affected, discharged the makers from further liability. *Held*, that the liability of the indorser was fixed by the insolvency of the makers; that when plaintiff paid the note, defendant became liable to contribute a moiety; and that defendant was estopped from questioning the agreement that induced the discharge. *Hutchinson v. Thacher*, 49 Rowell, Vt. 486.

**2760.** If a promissory note, not negotiable, is given to a married woman by a third person in consideration of her husband's giving up to him a like note, and she transfers the note, with her husband's consent, to a creditor of his, in fraud of other creditors, the maker, in an action upon it in her name, cannot take advantage of that fact. *Hurd- ing v. Colon*, 123 Mass. 299.

**2761.** Promissory note was executed on Sunday, but bore date the following day, and was indorsed before maturity, for value. *Held*, that the indorsee was not affected by the original invalidity of the instrument. *Trieber v. Com. Bank of St. Louis*, 31 Ark. 128.

**2762.** Promissory note made payable on a day named, "or before, if made out of the sale of J. B. Drake's horse, hayfork and hay carrier, with use," is payable at all events on the day named, with six per cent. per annum interest from date. *Cisne v. Chidester*, 85 Ill. 523.

**2763.** The mere fact of cancelling the signature of the makers of a dishonored promissory note and writing "paid" on the note, corrected before the note is sent back to the plaintiffs by a memorandum thereon "cancelled in error," cannot be effectual to charge a bank with the receipt of the money. Where a promissory note is dishonored to the plaintiffs, the amount thereof having been transmitted by transfer drafts and entries in the bank's books, from the branch where the same was made payable to the branch where the plaintiffs paid the same in, such transfer and entries not being communicated to the plaintiffs, *Held*, that the bank could not be charged with the receipt of the money. The position of branch banks is, that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes; *e. g.*, that of estimating the time at which notice of dishonor should be given; or of entitling a banker to refuse payment of a customer's check except at that branch where he keeps his account. *Prince, et al. v. Oriental Bank*, 41-42 Eng. Law Reports, 3 Appeal Cases, 1878, page 325.

**2764.** Promissory note, made payable to the order of the maker, has no validity until it is indorsed and transferred by him. *Payser v. Hull, Admr.*, 85 Ill. 511.

**2765.** The law in force when a promissory note is made and indorsed, regulates and defines the liabilities of the parties. *Cook v. Citizens' Mutual Ins. Co.*, 53 Ala. 37.

**2766.** Where, on the sale of a note, it is represented as business paper, the fact that it was in reality an accommodation note, ought to be clearly proved; if the law be not violated, the intent of the purchaser is wholly immaterial. *Smith v. Paton*, 6 Bos. 145; S. C., 31 N. Y. 66.

**2767.** Promissory note must be certain as to day of payment. A promise to pay a sum of money upon the condition that a railroad should be built to a place named on or before 20th of February, 1871, is not a promissory note, and is not negotiable as such. *Eldred v. Mulloy*, 2 Colorado, 320.

**2768.** A promissory note given in consideration of services, already rendered the maker, for which the payee had already received the amount mutually agreed on between them, is a mere gratuity and without consideration. *Holland v. Barnes*, 53 Ala. 83.

**2769.** In an action on a promissory note by the administrator of the payee there was evidence that, on the death of the payee, the note, in a division of the personal property made before the appointment of the administrator, fell to a daughter, who by an agent demanded of the principal maker payment of the note; that the maker replied that it was not convenient for him to pay it, but agreed to pay interest at eight per cent.; that the agent thereupon wrote the words "at eight per cent." on the note in the presence and with the assent of the maker; that surety on the note, when told of the maker's agreement, after his death, and when shown the note so altered, paid the interest at eight per cent. *Held*, that the legal title to the note was in the administrator, and that he could maintain an action upon it. *Held also*, that the evidence would warrant the jury in finding that both the maker and the surety assented to and ratified the note in its altered form, and thereby agreed to pay the same to the lawful holder for the sufficient consideration of an agreement to forbear, and an actual forbearance, by those who apparently had the actual control of the note and the equitable interest therein. *Prouty v. Wilson*, 123 Mass. 279.

**2770.** Where a petition alleges that "the defendant, by P. and A., her attorneys in fact, made and delivered to one T., her promissory note of that date, and thereby promised to pay to said T. or order," etc., and a copy of said note is attached to said petition as a part thereof, which is signed as follows: "Eliza C. Abeel, by Charles A. Phillip and John T. Abell" (Eliza C. Abeel being the defendant, and the sufficiency of the petition not being in any manner attacked until after judgment),—*Held*, that the allegations of the petition, with regard to the execution of the note, are sufficient to charge defendant. *Abell v. Harrington*, 18 Kansas, 243.

**2771.** If a person pays a promissory note through mistake, supposing the signature upon the note to be his genuine signature, he may, on discovering it to be forged, maintain an action to recover back the money paid, if he is not guilty of laches, whereby the situation of the other party is changed to his injury. *Welch v. Goodwin*, 123 Mass. 71.

**2772.** A note payable *on or before* six months from date, was declared upon as payable six months from date. *Held*, no variance. B. was interested with the plaintiff, his son, in the note in suit, which purported to be signed by defendant as surety for his son, the principal. The testimony tended to show that B., having heard rumors unfavorable to the principal's solvency, went to defendant and told him he held a note against him, and as he signed it as surety, and it was overdue, he thought he would let him know about it; that defendant, therefore, looked at the note, and at his name thereon, and said: "It is all right;" that about ten days thereafter, defendant asked B. what interest his (defendant's) son was paying on the note, and was told, and thereupon said that that was better than they could do at the bank; and that therefore B. supposed "everything was all right," and made no attempt to collect the note, nor to press payment thereof, until



about a year and a half afterwards, though the principal continued in business about six months thereafter as before. *Held*, that the testimony tended to show all that was necessary to estop defendant from denying that he signed the note. *Bates v. Leclair*, 49 Rowell, Vt. 229.

**2773.** A note otherwise negotiable, is not rendered non-negotiable by the addition of a stipulation to pay costs of collecting, including reasonable attorney fees, if suit be instituted thereon. *Seaton v. Scovill*, 18 Kansas, 433.

**2774.** When no time of payment is expressed in a note, the law adjudges it to be due and payable immediately. *Dodd v. Denny*, 6 Oregon, 156.

**2775.** The situation of a person, to whom money is paid by mistake on a forged note, is not changed to his injury by the fact that, on payment, he transfers to the payer a mortgage which he received as collateral security for the note, and which, with the note, he took in good faith, supposing the note to be genuine, the mortgage having been given as security for another note, of which the forged note was a copy. *Welch v. Godwin*, 123 Mass. 71.

**2776.** Minear, being indebted to the Bank of Idaho upon his promissory note, in consideration of an extension of time thereon to Minear. Miller executed his promissory note to the bank for the sum of Minear's note, with the understanding that both notes should be delivered up when either was paid. Moore, a stockholder in the bank, received both notes, with notice of all the facts, as a part of his share of the bank assets. The Miller note was regularly indorsed to him; the other was delivered without indorsement. *Held*, 1. That Miller's liability was not that of an indorser upon the Minear note, but that it grew out of an independent contract to pay a certain sum at a fixed time, upon conditions expressed in the agreement. 2. That Moore became the owner of the Minear note without indorsement, and that he had the right to maintain his action upon the Miller note. *Moore v. Miller*, 6 Oregon, 254.

**2777.** A parol agreement, by which the purchase money notes were to be deposited with an attorney, and from the proceeds of such notes outstanding liens against the land deeded to the maker of the notes were to be taken up and discharged, may be shown, in defence of an action upon such notes. Such an agreement is so far distinct from and collateral to that part of the contract reduced to writing as to allow of its establishment by parol evidence. *Thomas v. Hammond*, 47 Texas, 43.

**2778.** Where a note, taken in renewal of the balance due on another, secured by a deed of trust, is negotiated by the payee, the purchaser of the new note is entitled to enforce the deed of trust to secure payment thereof. Giving a new note for the balance due on an old one, will not operate to discharge the security, unless it is apparent that the parties intended to extinguish the lien of the deed of trust. *Gleason v. Wright*, 53 Miss. 247.

**2779.** M., the payee of a promissory note, asked defendant to indorse it, which he refused to do unless the plaintiff would indorse it. M. promised to procure plaintiff to indorse it, whereupon defendant indorsed it. Plaintiff, on being asked to indorse it refused to do so un-

less M. would procure defendant to sign with him a note for a like sum, payable to plaintiff as security therefor, which M. agreed to do, whereupon plaintiff indorsed it. M. afterward procured defendant to sign the second note as agreed, and delivered it to plaintiff. *Held*, that as the second note was given without any new consideration, for the purpose of indemnifying plaintiff for indorsing the first note, on which plaintiff and defendant were made co-sureties, the second note was, as between the parties, *nudum pactum* and invalid. *Hutchinson v. Thacker*, 49 Rowell, Vt. 486.

**2780.** A *bona fide* holder of a note, who purchased it for value before it fell due, and without notice of payments made on it, can collect the face of the note and interest. The assignee of a promissory note, who purchases it in good faith before it falls due, without knowledge that payments have been made on it, and receives a covenant from the payee that the sum he pays for it is due, cannot maintain an action on the covenant if such amount is not due, for he sustains no loss, as the payer is liable to him for the face of the note. *Small v. Clarke*, 51 Cal. 227.

**2781.** When at the time of the execution of a promissory note, a contract in writing is made between the payer and payee upon a separate piece of paper, which describes the note and clearly refers to it, the note is to be read in connection with the contract as though it had been incorporated into it, and, in an action on the note brought by the payee, the payer may introduce evidence that the payee has broken the stipulations of the contract. *Goodwin v. Nicherson*, 51 Cal. 166.

**2782.** Circuit Court rule 79 excuses the plaintiff on a promissory note from proving its execution, if the defendant omits to file an affidavit denying it. *Held*, that the only object of this rule is to enable the plaintiff to make out a *prima facie* case, not a conclusive one, and that it would not preclude a defendant from introducing any defence on the merits that did not contradict the execution of the note. It would not prevent an indorser from showing that he had signed without consideration, and after the note had been delivered. *Enright, et al. v. Ellison*, 37 Mich. 459.

**2783.** The execution of a note is only its actual making and delivery. *Ibid.*

**2784.** It seems that where the considerations of a note is open to inquiry at all, it is as much so in behalf of any one of the defendants as of all. *Ibid.*

**2785.** In action on partnership paper given *mala fide*, but binding one partner, evidence is admissible to exonerate a copartner. *Ibid.*

**2786.** Contemporaneous and subsequent guarantees have the same contract force, and differ only as to what considerations sustain them. *Ibid.*

**2787.** Subsequent indorsement does not make the indorser jointly liable with his principal, and joint liability is not presumed when the indorsement is not dated; it is shown by independent proof of contemporaneous execution. *Ibid.*

**2788.** The production of a note in evidence under the common counts without objection, will not preclude raising the objection that it varies from a special count. *Ibid.*



**2789.** In an action on a note by a holder who received it after it became due, and who in fact was a mere agent and *nom de plume* in the matter. *Held*, that the defendant might plead in such action all matters which might have been pleaded to the owner of the note, and also obtain a reduction of the usurious interest included in the note and of payments made on account thereof. *Brooks, et al. v. Clegg*, 12 L. C. R. 461; Q. B. 1862; 2287 C. C.

**2790.** A note given to the new firm formed after the dissolution of the old, in satisfaction of a guarantee given to the old for advances made by them, was *held*, reversing court below, to have been given in error and without consideration, and was therefore void. *Henault v. Thomas, et al.*, 1 L. R. 706, Q. B. 1868.

**2791.** The evidence of the plaintiff in an action on a note is admissible to prove that the note, though dated at Montreal, was made at Quebec. *Gault, et al. v. Wright, et al.*, 13 L. C. J. 60; S. C. 1868.

**2792.** A demand and notice are not necessary as against an indorser who at the date of the maturity of the note has sufficient property of the maker in his possession held as security against his liability. *Beard v. Westerman*, 32 Ohio, St. 29.

**2793.** If the indorsee of a note has protected himself against loss by taking collateral security of the maker, it is a waiver of his legal right to require proof of demand on the maker and notice to himself of non-payment. *Mead v. Small*, 2 Greenleaf, 297.

**2794.** If the indorser has security in his own hands fully equal to his liability he can suffer no loss by the want of demand and notice, therefore he has been held liable in such a case without proof of those facts. *Marshall v. Mitchell*, 35 Maine, 221.

**2795.** If the indorser receives security to meet a particular indorsement, he waives a demand and notice in respect to that indorsement but not as to any other. *Prentiss v. Danielson*, 5 Conn. 175.

**2796.** A bond and mortgage were assigned to a third party in trust to secure the indorser if the maker should fail to pay the note, and the indorser was held notwithstanding a defective notice. *Barrett v. Charleston Bank*, 2 McMullen, 191.

**2797.** The indorser being indemnified by a mortgage he was held responsible although the demand was made a day too late. *Wart v. Mitchell*, 6 How. Miss. 131.

**2798.** The second indorser on a note who had received ample security from the first indorser thereon, was held, although the security he held had afterward become doubtful. *Ibid.*

**2799.** The want of the words "for value received," does not prevent a plaintiff from recovering on a note if it be in evidence that value was given therefor. *Duchesney v. Evarts*, 2 Rev. de Leg. 31, K. B. 1821, 2285 C. C.

**2800.** Promissory note under £50, drawn to order, may be validly transferred for value received by him to whose order it is made without indorsation, and parol evidence is admissible to prove such transfer. *Dupuis v. Marron*, 17 L. C. J. 42, C. C. 1873; 1233 & 2341 C. C.

**2801.** Action was brought on a note and open account, and defendant pleaded that he had sent in a renewal note to the plaintiffs which they retained in their possession and which had not yet ma-

tured, and the plaintiffs replied that they had never agreed to renew. *Held*, that defendant was bound, unless on acceptance by plaintiffs, to call and take away the renewal note, and the mere fact of plaintiffs not returning it could not be construed into an agreement to renew. *Lyman, et al. v. Chamard*, 1 L. C. J., 285, S. C. 1857.

**2802.** Where certain notes were nearly out of date, the defendant was called on by the holder of them, and notified that unless something was done suit would be brought upon them. Whereupon the defendant signed the following indorsement upon each of the notes: "Paid Dec. 16th, 1872, \$500 on acct. of this note to revive the same." *Held*, that if the parol evidence of the agreement relied on by him as a defence, was otherwise admissible, the defendant had effectually precluded himself from the resort to such defence by said indorsement upon the notes. *Held*, further, that if there were any question of the plaintiff's right to recover on the notes as specially declared on, there could be none whatever of their right to recover on them with the defendant's indorsement thereon, under the count on an account stated. *McSherry v. Brooks and Barton, Trustees*, 46 Md. 103.

**2803.** Action was brought on a note signed by a married woman separate as to property, without the authority of her husband. *Held*, confirming court below, that as the defendant was at the time of making the note in question a *merchande publique*, that the authorization of her husband was unnecessary. *Beaubien & Husson*, 12 L. C. R. 47, Q. B. 1862; 179 C. C.

**2804.** Promissory note signed with an X in presence of a witness is good and valid. *Collins v. Bradshaw*, 10 L. C. R. 366, C. C. 1860. Defendant was sued on a note signed with a cross, and pleaded, denying the signature, and plaintiff failed to prove the signing. *Held*, that the action must be dismissed. *Coupal v. Coupal*, 5 R. L. 465, S. C. R. 1873.

**2805.** A promissory note not yet due, indorsed by a party who has since become bankrupt, does not entitle the holder to be paid *au mare la livre* concurrently with the other creditors of the bankrupt, the term for payment not having expired. *Mailloux Audet & Mailloux & Carrier*, 14 L. C. R. 207, C. C. 1864.

**2806.** Where a note is executed by a married woman authorized by her husband, for property bought by her, during marriage, and it is not shown that she is separate in property, nor that she administered her paraphernal property, nor that she was a public merchant, nor that the property inured to her separate benefit, she cannot be held liable on the note. Such note is a debt of the community, inasmuch as the property, the consideration of the note, belongs to the community. For such a debt a wife, such as is sued herein, is incapable of binding herself. The husband is liable. *Mr. M. W. Graham v. Mrs. Z. A. Thayer*, 29 La. 75.

**2807.** Stewart lent to Sterling and Cooper \$250 each and took their joint note for \$500; Sterling was liable for half the note as principal and half as surety. Stewart told Sterling that if he would pay half the note he would give him a receipt in full for his half; Sterling paid the half and the receipt given. *Held*, that this did not release him from the other half. *Sterling v. Stewart*, 74 Penn. St. Repts. p. 445.



**2808.** The act of May 4, 1869 (66 Ohio, L. 93), making it a penal offence to take a "promissory note or other negotiable instrument" not containing the words "given for a patent right," knowing the consideration thereof to be a patented invention, does not include in such offence the taking of notes or instruments not negotiable. An indictment which does not show that the note or instrument on which it is founded was negotiable, does not show an offence under the act, and may be met by demurrer. *State v. Brower*, 30 Ohio, 101.

**2809.** The maker of a promissory note, after judgment recorded against the indorser, not a competent witness for the indorser in a suit in equity to restrain the collection of the judgment. *McDowell v. Bank of Wilmington and Brandywine*, Bates, 2 Delaware, 1.

**2810.** A bank being the holder of a promissory note protested for non-payment, has not the right to credit it with deposits made by the debtor to his account as a justice of the peace; and its omission to do so does not discharge the indorser. *Ibid.*

**2811.** An agreement by the bank to credit the note with such fees as the debtor might earn as a notary public in protesting bills and notes for the bank does not discharge the indorser, though made without his privity. *Ibid.* *Philpot v. Bryant*, 4 Bing. R. 721; also, 13 Eng. Com. Law, 128.

**2812.** An agreement between the creditor and the principal debtor, in order to discharge the surety, must be such as gives time to the debtor; and it must be for a consideration. *Ibid.*

**2813.** The indorser of a promissory note due the 11th February, gave to the holder a memorandum, as follows: "My note, becoming due the 10th instant, good for ten days after date." The note to which he referred became due the 11th, there was no other note, and it was presented the 24th February. *Held*, the indorser was liable. *Burnett v. Monaghan, et al.*, 3 R. L. 448; L. C. R. 1871, 2324 C. C.

**2814.** A mere memorandum made by a party on a note, or obligation, in his possession, cannot, when the fact it purports to establish is denied, be admitted as testimony sufficient to create or continue the liability. In this case the statute of limitations was pleaded, and the fact that the payment indorsed on the note was actually made, was controverted by the personal representative of the payer. The judgment of the circuit court, sustaining the plea of the statute of limitations, is affirmed. *Frazer's Adm'rs v. Frazer, et al.*, 13 Bush, Ky. 397.

**2815.** Promissory notes, payable at and discounted by an incorporated bank, are placed, by the law of this State, upon the footing of foreign bills of exchange. *Duncan v. Louisville, etc.*, 13 Bush, Ky. 378.

**2816.** Alterations, erasures, or mutilations of a paper upon which a liability is sought to be established against those who are originally bound, must be explained by the holder, when the fact of alteration, erasure or mutilations is raised in the pleading, and established by the proof. *Frazer's Adm'rs v. Frazer, etc.*, 13 Bush, Ky. 397.

**2817.** The defendant was sued on a note signed while he was yet a minor, which fact he pleaded simply as a defence to the action.

*Held*, that the plea was insufficient, on the ground that the defendant should have pleaded lesion and asked to be released from the obligation. *Cartier v. Pelletier*, 1 R. L. 46; S. C., 986 and 1002 C. C.

**2818.** The taking of a promissory note for an antecedent debt imposes upon the creditor an obligation to wait for his pay till the note matures, without any special agreement to that effect, or any understanding that the debt shall be thereby extinguished; and the delay thus obtained is a sufficient consideration for the note. Therefore, the note of a married woman, given for the antecedent debt of her husband, is not void for want of consideration, if it is made payable at a future day. The court is not satisfied that, at the time of the giving of the note in suit, the defendant did not have an intelligent understanding of what she was doing, nor that there was any such fraud or imposition practiced upon her as ought to avoid the note. *Thompson v. Gray*, 63 Me. 228; also, *York v. Pierson*, 63 Me. 587.

**2819.** A note promising to pay A., or his order, £20 on account of B., enables the indorser of A. to recover the amount. *Newton v. Allen*, 2 Rev. de Leg., 29 K. B.; and *Moir v. Allen*, *Ibid.* 1817. And on such a note payment must be made to A. or A.'s order, and not to B. *Clarke v. Esson*, 2 Rev. de Leg., 30 K. B. 1820.

**2820.** When the maker of the note has, himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice, when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it. Daniel on Negotiable Instruments, section 1405, sustained in *Blakey v. Johnson*, 13 Bush, Ky. 197.

**2821.** R. held the promissory note of the firm of T. G. & Co. After it was given, some members of the firm retired, leaving assets sufficient to pay all debts, and taking the obligations of the succeeding new firm, to pay all debts and save the retiring partners harmless. *Held*, that unless R., by some valid contract, expressed or implied, had made himself a party to this new arrangement, or had so acted as to be estopped, his rights on the note against all the members of the old firm remained unchanged; that while, as between the partners themselves, the relation of principal and surety existed, yet, as to the payee of the note, all were principals and joint debtors, although notice of such obligation was brought home to him. Where the payee of such note has received from the new firm a chattel mortgage of the partnership property sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had such notice of the subsequent contract between the parties. *Rawson v. Taylor*, 30 Ohio, 389.

**2822.** Proof of the due execution of such procurement must be made to entitle the plaintiff to recover judgment in an *ex parte* suit on the note. *Ettrier & Thomas*, 15 L. C. J. 225, Q. B. 1873. And even



where the defendant is in default to appear. *Ibid.* 17 L. C. J. 79, Q. B.

**2823.** Promissory note of hand executed by the maker's mark if indorsed gives no action to the indorsee against the maker, but the indorser is answerable for money had and received. *Jones v. Hart*, 2 Rev. de Leg. 29, K. B. 1819.

**2824.** A note of hand was transferred after the time appointed for payment, and there was fraud proved in the transaction. *Held*, that on slight grounds the law would presume that the indorser had knowledge of the fraud, if it appear that he omitted to satisfy himself as to the validity of the note. *Hunt v. Lee*, 2 Rev. de Leg. 28, K. B. 1813.

**2825.** Promissory note made by defendant in favor of another. The note was not paid or protested at maturity, but some time afterwards the payee indorsed it over to plaintiff, in part payment of things purchased from him. In an action on the note, want of protest was raised by the defendant. *Held*, that the note might be transferred after maturity, but the maker could raise all the questions which might have arisen in the meantime between himself and the payee. *Duguay v. Sénécal*, 1 L. C. L. J. 26, S. C. R. 1865.

**2826.** Promissory notes given by insolvents a few days before the insolvency, to secure parties to whom they were indebted on accommodation paper, and on these notes being transferred the transferees claimed to rank on the estate of the insolvents for their value. *Held*, that such notes were null and void *ab initio*, even in the hands of an innocent holder for value before maturity. *Davis, et al. in re, and Muir & Chamberlin, et al.*, 13 L. C. J. 184, S. C. 1869, 1032 *et seq.* C. C., & Ins. Act, 1875, §§. 130-133.

**2827.** A firm issued paper with accommodation indorsements, and protected the indorsers by a mortgage executed by the partners. Subsequently one of the partners retired, and the remaining partners formed a new firm, which issued paper in renewal of some of that issued by the old firm. This new paper was indorsed by one of the former indorsers, and a new mortgage, executed by all the members of the old firm, covering the estate previously mortgaged, with other property, protected this indorser: After voluntary assignment by the new firm, the retired member of the old firm, and the last named indorser. *Held*, that the new paper was a mere renewal of the old, and that holders of the new paper were entitled equally with holders of the old to the fund furnished by the first. *Held*, further, that no inference of the absolute payment of the old paper by the new could be drawn either from the fact that the new mortgage was given, or from the fact that the old paper was surrendered or cancelled on the issue of the new. *Held*, further, that an agreement to discharge a retiring partner will not be inferred from the mere acceptance of the note of the continuing partners for the joint debt. *Nightingale v. Chafee*, 11 R. I. 609; see *Wilbur v. Jernegan*, 11 R. I. 113.

**2828.** Defendant pleaded that the note sued on had been obtained from him by surprise and false representations, and for insufficient consideration. *Held*, that he was not bound to produce with such plea an affidavit under C. S. L. C. cap. 83, § 86. *McCarthy, et al. v. Barthe*, 6 L. C. J. 130, S. C. 1862.

**2829.** Before a note of hand payable *à terme*, becomes due action may be maintained for the amount against the drawer if he absconds. *Shepherd v. Henrickson*, 2 Rev. de Leg. 31, K. B. 1819.

**2830.** Promissory note for £100 was given by an insolvent to one of his creditors in settlement of a claim of the creditor against another party for whom the insolvent was surety, the creditor refusing to sign the composition deed of the insolvent unless such settlement were made. *Held*, that as the settlement was in no way prejudicial to the other creditors who received the composition to which they agreed, that the note was good, and the action on it must be maintained. *Greenshields v. Plamondon*, 8 L. C. J. 192, 10 L. C. R. 251, Q. B. 1860, reversing 3 L. C. J. 240, S. C. Ins. Act, 1875, §§ 55 & 56.

**2831.** Defendant pleaded want of notice of protest, but produced no affidavit in support of such plea. *Held*, that the action would be maintained, notwithstanding the protest produced contained no certificate that notice of such protest had been given. *The Bank of Upper Canada & Turcotte*, 15 L. C. R. 276, S. C. 1865, 145 C. C. P.

**2832.** Promissory note payable in this country must be made in money current in this country, and that notwithstanding the note in question may have been made in a foreign country. *Chapman v. McFie, et al.*, 1 R. L. 192, S. C. R. 1869.

**2833.** The holder of a promissory note being requested by a surety to proceed against the principal maker, and failing to do so, if the principal maker afterward becomes insolvent the surety is exonerated. *Pain v. Packard*, 13 Johns., affirmed in *Martin v. Skehan*, 2 Colorado, 614.

**2834.** The stamp of a bank on a promissory note is not an infallible indication of the legal holder and owner. *Barthe v. Armstrong*, 5 R. L. 213, C. C. 1869.

**2835.** The holder and owner of a note may cancel any of the indorsations and reserve his recourse only against the maker, and may bring his action as if he had received it from the payee or any subsequent indorser, whose name is not cancelled. *Ibid.*, and 2289, C. C. Canada.

**2836.** A note to a creditor for the balance of his claim in consideration of his having signed a deed of composition is void. *Blackwood v. Chinic*, 2 Rev. de Leg. 27, Ca. K. B. 1809.

**2837.** In an action to recover the amount of an I. O. U., *Held*, that such an instrument was negotiable like other mercantile paper. *Beaudry v. Laflamme & Davis*, 6 L. C. J. 307; S. C. 1862, Canada.

**2838.** Where a claimant in insolvency had received, as holder of a promissory note, a composition on the amount of his claim from an indorser, in consideration of which he had released the indorser, reserving his recourse against the other parties to the note, *Held*, that whatever the claimant had received from the indorser must be deducted from his claim against the maker's estate. *Bessette, et al. v. La Banque du Peuple & Quevillon*, 15 L. C. J. 126, S. C. R. 1871, Canada.

**2839.** Plaintiff sued upon the following instrument: "12 months from the 26th June, 1873, I (defendant) will pay J. C. (plaintiff) \$90, for D. P., or otherwise settle the sum of \$90 for him, on a note that he says he gave J. C., for \$100." *Held*, 1. That this was not a prom-



issory note, and required a consideration to support it. 2. That it was a promise made to D. P. and not to plaintiff. *Cochran v. Caie*, 3 New Brunswick Reports, 224.

**2840.** A promise in writing to pay on a day certain £250 to A. B. or order, with an engagement to pay in cash or in goods, if the holder should choose to demand the latter, is a promissory note, for this engagement is no more than a power given to the holder to convert a promissory note into an order for merchandise if he see fit to do so. *McDonald v. Holgate*, 2 Rev. de Leg. 29, K. B. 1818; 2344 C. C., and art. 229, *infra*, Canada.

**2841.** A promise to pay a note to the holder which is not indorsed is sufficient to enable the holder to recover if the drawer knew that it was not indorsed. *Aylwin v. Cruttenden*, 2 Rev. de Leg. 30, K. B. 1820; 2285 C. C.

**2842.** In an action for goods sold, in which the defendant pleaded payment and novation by a promissory note which he had given to the plaintiff, *Held*, that a writing merely certifying that a person is indebted to another in a certain sum of money, is not negotiable as a promissory note, and if it were it would have been no novation of the debt. *Dasylya, et al. v. Dufour*, 16 L. C. R. 294; C. C. 1866, Canada.

**2843.** A son, having acknowledged to have stolen \$25, the mother was induced to sign a promissory note under threats of having her son arrested. *Held*, that she was not liable on the note in question. *Macfarlane v. Devy*, 15 L. C. J. 85, Q. B. 1871; 994, C. C., Canada.

**2844.** Action was brought on a promissory note having two years or thereabouts to run, on the ground that the maker had become insolvent and had left his domicile in Lower Canada, and the defendant demurred on the ground that the plaintiff had not alleged either fraud or secretion of his estate. *Held*, dismissing the demurrer, that the note was eligible on proof of insolvency. *Lowell v. Meikle*, 2 L. C. J. 69, S. C. 1853; Ins. Act, 1875, § 80, Ca.

**2845.** A note executed in 1863 for the balance due upon a note executed in 1853 (such new note being given because of a lack of space on the old note for entry of a credit), is not subject to the legislative scale of Confederate money. *Cobb v. Gray*, 78 N. C. 94.

**2846.** Action was brought on a promissory note payable on demand thirteen years after its date, and prescription being pleaded, *Held*, that it was due from the day of its date, and if action were brought on it, and no demand of payment proved, that the omission could not affect the action, and merely the costs, and therefore the prescription ran from the day of its date. *La Rocque, et al. v. André, et al.*, 2 L. C. R. 335, S. C. 1851; 2260, § 4 C. C. C.

**2847.** On action to recover the amount of a promissory note signed by the secretary-treasurer of a municipality,—*Held*, that where the power of signing such promissory notes was not expressly given to the corporation by its charter or otherwise, that it could not be implied as necessary to accomplish any of the purposes for which the corporation was created. And *held*, also, that a promissory note signed by such corporation in settlement of a judgment against the municipality, was null, the legislature having empowered municipalities to raise money in a different way. *Pacand v. The Corporation of Halifax South*, 17 L. C. R. 56, S. C. R. 1866, Canada.

**2848.** In an action on a promissory note against an indorser, it is not necessary for the plaintiff to allege in his declaration indorsement subsequent to the defendants, where the plaintiff does not sue upon any title derived through such subsequent indorsements. *Bank of America v. Senior*, 11 R. I. 376.

**2849.** In an action on a note made in the United States, and payable there, defendant, after action brought, tendered the amount in Canadian currency, equal at the then current rate of exchange to the amount of the note in American currency, with costs. *Held*, that judgment must be given for the amount of the note in Canadian currency with costs. *Daly v. Graham*, 15 L. C. R. 137, and 8 L. C. J. 340, C. C. 1864. And in another case of the same kind,—*Held*, that the note being payable to bearer, the maker must be held to have agreed to pay in the currency of the place where the bearer resided, and, consequently, that a tender of payment in greenbacks was insufficient. *McCoy v. Dineen*, 8 L. C. J. 339, S. C. 1864, Canada.

**2850.** No set form of words is requisite to constitute a promissory note, and an instrument called a writing obligatory as a bond payable to order for value received, may be considered as a note in writing within the intent of the Provincial Statute 34 Geo. 3, Cap. 2, though it do not follow the very words of the act, and though it be merely described and designated in the plaintiff's declaration as writing obligatory or bond. *Hall v. Bradbury, et al.*, 1 Rev. de Leg. 180, Q. B. 1845.

**2851.** An obligation before a notary to pay a certain sum of money without condition and at all events is a promissory note. *Aurèle v. Durocher*, 5 R. L. Eng. 165, S. C. R. 1873; 2244, C. C.

**2852.** A statute of the State provides that "all payments or compensations for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties to such sale, to have been received in violation of law, without consideration, and against equity and good conscience." With this law in force A. agreed to purchase of B. a half interest in a business and stock in trade, a portion of which consisted of liquor illegally kept for sale, and transferred a promissory note for \$450 in part payment. A. afterward repudiated the arrangement and sued for the value of the note. *Held*, that A. could recover so much of the value of the note as might have been paid for liquor illegally kept for sale, the proportion to be recovered as paid for liquor to be determined by finding the proportional value of the liquor as compared with the rest of the purchase. *McGuinness v. Blegh*, 11 R. I. 94.

**2853.** One H. made his promissory note to the order of Senior. It was indorsed by Senior, and subsequently by Stone, and by the A. Co. by Stone, treasurer. It passed into the possession of the Bank of America and was taken up by Stone, who brought suit on it against Senior in the name of the bank. At the trial, evidence was admitted by the presiding judge, notwithstanding Senior's objection, to show that Stone had paid the note to the Bank of America in full, and had left it for collection with the bank, and that the bank authorized Stone to bring suit in its name. Senior also requested the judge to instruct the jury that, as the note had been paid to the bank in full, it could neither bring suit on the note nor authorize Stone to do so in its name.



This instruction was refused, and the jury was told that if the facts, as claimed by the plaintiff, were satisfactorily proved, the plaintiff could recover. *Held*, no error. *Bank of American v. Senior*, 11 R. I. 376.

**2854.** In an action on a promissory note against an indorser, it is not necessary for the plaintiff to allege in his declaration indorsements subsequent to the defendants, where the plaintiff does not sue upon any title derived through such subsequent indorsement. *Ibid.* 376.

**2855.** A note payable to the order of W. was before issue indorsed by F. It was signed by G., and his signature was, at the request of W., changed to G., agent. The note was given for G.'s private debt. F. did not assent to the change, and there was no evidence to show that G.'s principals were accustomed to pay notes drawn in this form. In an action against F., *Held*, that the change was immaterial. *Held*, further, affirming *Mathewson v. Sprague*, 1 R. I. 8; and *Perkins v. Barstow*, 6 R. I. 505, that F. was not entitled to notice of non-payment. *Manuf. & Merchants' Bank v. Follett*, 11 R. I. 92.

**2856.** Due presentment of a note, when denied, is sufficiently shown by evidence that the note was in the bank where it was made payable, and in the possession of its officers, on the day of its maturity, and that the makers had no funds there for its payment. When this proof is made, it is not necessary, on this issue, to show that formal presentment and demand were made. When a note is in the bank, in the custody of the proper officer, on the day of its maturity, such possession is treated as due presentment. *Huffaker & Shy v. National Bank of Monticello*, 13 Bush, Ky. 644; also, 1 Daniels on Negotiable Instruments, p. 486, § 656.

**2857.** E. & M., having been in copartnership in the firm of Wm. M. & Co., and E. having subsequently entered into partnership with other parties under the firm name of J. E. & Co., by an agreement passed in July, 1855, M. agreed with J. E. & Co. to assume all the liabilities of Wm. M. & Co., to pay the sum due E. & Co. in four installments, and to give security on condition that he should be allowed to cut timber on certain timber limits of E. & Co. He subsequently cut timber without giving security, and the timber was transferred to the firm of Symes & Co., which had made advances to him. M. paid E. & Co. the first installment of the above mentioned debt by his notes, and for £1,500, which E. & Co. paid away to a third party, and one for £800, which E. & Co. placed to the credit of M. & Co. E. & Co., having by *raisie arret* before judgment seized the timber cut as in the possession of M., and having sued for the whole debt. *Held*, that E. & Co., having paid away the note for £1,500 to a third party, could not sue for the debt for which it was given without producing the note, and also that E. & Co., having carried the note for £800 to the credit of Wm. M. & Co., could not withdraw it from that account without the consent of M. *Gibson, et al. v. Moffat & Young*, 2 L. C. L. J. 60, Q. B. 1866. *Held*, also, that the plaintiffs not having alleged the insolvency of M., in their declaration, could not base their right to sue for the whole of the debt on such insolvency, and the allegation of his insolvency in their special answer could not avail to supply the deficiency in their declaration.

**2858.** The date of a promissory note is proof that the note was

made on such date, and in the case in question. *Held*, that the party could not prove that the note had been made on a day posterior to its date, and that in consequence it fell within the operations of a subsequent deed of compromise between the respondents and their creditors, among them was the appellant. *Evans & Cross, et al.*, 15 L. C. R. 86, S. C. R. & 16 L. C. R. 469, & 2 L. C. L. J. 79, Q. B. 1866.

**2859.** The holder of a promissory note does not require to prove that it was actually made on the date it bears, as the date makes proof of itself. *Hutchins, et al. v. Cohen & Cohen*, 14 L. C. J. 85, S. C. 1869.

**2860.** On an appeal from a judgment condemning the defendants jointly and severally to pay the amount of the promissory note sued upon, *Held*, reversing the judgment of the court below, that a promise to pay at a specified place is not a promise to pay generally, and there is no liability on the part of the maker of a promissory note payable at a specified place, unless proof be made of a presentment and of demand of payment at such specified place, and of neglect or refusal there to pay the amount of such note. *O'Brien & Stevenson, et al.*, 15 L. C. R. 265, Q. B. 1865, 2307 C. C.

**2861.** Given in discharge of an antecedent debt in Rhode Island does not discharge the debt unless the note is given and received as absolute payment, and the burden of proof is on the debtor to show that it was so given and received. Nor does it make any difference that the makers of the note so given are fewer in number than the original debtors. *Nightingale v. Chafee*, 11 R. I. 609.

**2862.** Promissory note given for a precedent debt in Rhode Island does not, *prima facie*, operate as absolute payment of the debt, but rather as an extension of credit or as only conditional payment; and if the note at maturity is not paid, the right to sue the original debt and enforce its securities revives. But though, *prima facie*, the note has only this effect, yet if it was given and received by the parties as absolute payment or satisfaction, the debt will, upon proof that the note was so given and received, be regarded as paid or satisfied. *Wilbur v. Jernegan*, 11 R. I. 113; also, *Nightingale v. Chafee*, 11 R. I. 609.

**2863.** The holder of a negotiable note, who has bought it in good faith, and before its maturity, acquires a valid title to it, though it be shown that the vendor of the note was not its owner, and fraudulently disposed of it. *R. N. Ogden v. A. Marchand*, 29 La. 61.

**2864.** The maker and the indorser of a promissory note, although not technically debtors in *sole*, are yet liable, *each*, for the whole debt. *Paul Mack v. C. E. Fortier, et al.*, 29 La. 63.

**2865.** The pledge or sale of a negotiable instrument before its maturity carries with it all the liens by which the instrument is secured, and by such sale, or pledge, the transferee divests of all power to affect the liens which secure the instrument. *Mechanics' Building Ass. v. C. L. Ferguson*, 29 La. 548.

**2866.** In an action at law on a promissory note, facts which constitute mere matter of defence, and are available as such in the pending action, will not, in general, entitle the defendant to equitable relief. Such affirmative relief will be granted only when necessary to prevent wrong or injustice. *Bank v. Weyland*, 30 Ohio, 126.

**2867.** In a suit by the assignee against the assignor of a note,



where diligence by suit against the maker is not shown, the burden of proof is upon the plaintiff to establish the insolvency of the maker. *Clayes v. White*, 83 Ill. 540.

**2868.** In an action upon a promissory note, alleged to have been purchased by the defendant for the plaintiff's intestate, with money furnished by the latter, wherein defendant pleaded payment, it is proper to submit to the jury the question whether the transaction constituted a payment or a purchase of the note. While the mere delivery of money by the payer to the holder of a note is presumptive evidence of payment, yet this presumption may be rebutted by circumstances. *Dougherty v. Deeney, et al.*, 45 Iowa, 443.

**2869.** Where a promissory note had been transferred by indorsement as collateral security, and then, before maturity, with the knowledge of the indorsee, the payee had sold it to a third party, into whose possession it did not come until after maturity: *Held*, that the latter acquired it free from equities, and occupied the position of a good faith indorsee before maturity. *Grimm v. Warner, et al.*, 45 Iowa, 106.

**2870.** Where, at the request of the party with whom he deals, one makes his promissory note (which is to be partial payment for a piece of work to be done for him) payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party in good faith, the maker cannot set up a failure of consideration, as between himself and the party with whom he deals, in defence of a suit upon such note, in the name of the payee. *So. Boston Iron Co. v. Brown*, 63 Maine, 139.

**2871.** In an action upon an unindorsed promissory note, by a plaintiff alleging himself to be the owner thereof by devise from the payee, the representative of the latter should be made a party defendant, or the complaint should allege that there is no such representative; but a failure to object to such defect is a waiver thereof. *St. John v. Hardwick*, 11 Ind. 251; also, *Strong v. Downing*, 34 Ind. 300; *Shane v. Lowry*, 48 Ind. 205; *Shirts v. Isom*, 54 Ind. 13; *Bray v. Black*, 57 Ind. 417.

**2872.** Where a woman assigns by delivery a note payable to her order, and afterwards marries the maker, her indorsement after such marriage transfers the legal title. The statutes of Maine give no mutual right of action to the husband and wife, and none such exists by common law. Such has been the uniform construction of this and similar statutes in Maine and Massachusetts. *Crowther v. Crowther*, 55 Maine, 358; also, *Guptill v. Horne*, 63 Me. 405.

**2873.** Evidence to impeach a promissory note in the hands of a *bona fide* purchaser for value, before maturity and without notice is inadmissible. *Waite v. Chandler*, 63 Me. 257.

**2874.** A married woman with the consent of her husband may make an equitable assignment of a note and mortgage executed to her, by the sale and mere delivery of the same to another. *Baker v. Armstrong*, 57 Ind. 189.

**2875.** The holder of a solidary note cannot have its solidarity impaired, by the unauthorized action of his collection agent, who receipts in favor of one of the solidary debtors on the note for "his share" of the debt. *Cooley v. Broad*, 29 La. 345.

**2876.** The holder of a negotiable note of a married woman, who

has taken it for value, and before maturity, is yet liable to have pleaded against him every defence arising out of the wife's incapacity. *Conrad, et al. v. Lee Blanc, Sheriff*, 29 La. 123.

**2877.** In respect to the time within which it is necessary to present for payment a note, payable on demand, in order to charge an indorser, that "it depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another." *Seaver v. Lincoln*, 21 Pick. 267.

**2878.** Where in renewal of a matured promissory note executed by his decedent, the administrator or executor of an estate, as such, executes to the payee a new promissory note, he thereby becomes personally liable, but the estate is not bound. *Cornthwaite v. The First Nat. Bank, etc.*, 57 Ind. 268; also, *Mills v. Kuykendall*, 2 Blackf. 47, and *Carter v. Thomas*, 3 Ind. 213.

**2879.** Where a bill is accepted by a firm, a notarial certificate of protest must state who compose the firm, and upon which of them the demand was made. *Oswego County Bank v. Warren*, 18 Barb. N. Y. 290.

**2880.** When the indorser of a note lives in a different place from that in which presentment or demand is to be made, personal service of notice of protest is not required, but the notice may be served on him by mail, although he lives in the same place with the holder who serves the notice. Delivery to a city letter-carrier of a notice of protest enclosed in an envelope, properly addressed and with postage paid, is good service by mail.

**2881.** Where a note held in New York was payable in Kutztown, Pennsylvania, and the holder placed it in a New York city bank for collection, which sent it to its Pennsylvania correspondent, a bank at Allentown, within eighteen miles of Kutztown, whence it was sent to a bank at Philadelphia, and thence to a bank in Reading, and thence to Kutztown for presentment, where it was dishonored: *Held*, that each agent for transmission of the note for collection, having indorsed it, was the holder for the purpose of receiving and giving notice of protest; and that the return of such notice by the same channel, each bank forwarding them by the next mail, was not an unnecessary and unreasonable delay which discharged the first indorser. *Wynen v. Schappert*, 55 How. Pr. N. Y. 156.

**2882.** In an action by an assignee, on a promissory note payable in a bank of this State, where the defences pleaded by the defendant maker were want of consideration, and that, after the execution of the note and before its assignment, the payee thereof, with the knowledge of the plaintiff, but without the knowledge or consent of the defendant, had procured the execution of such note by a third person, the plaintiff replied, that before procuring such assignment to himself, he had taken such note to the defendant, who, in answer to his inquiries concerning it, informed him that he had no defence thereto, and would pay it, and that, relying upon such statements, the plaintiff had procured an assignment of the note, for value. *Held*, on demurrer, that the reply is sufficient. *Vaughn v. Ferrall*, 57 Ind. 182.

**2883.** The defendant pleaded a general denial, there having been no notice of protest given him. The plaintiff answered that a verbal



notice had been given to the defendant, and examined a notary to prove the giving of such verbal notice. The action was nevertheless dismissed. *Cowan v. Turgeon*, 1 Rev. de Leg. 231, Q. B. 1832; 2303 and 2327 *et seq.* C. C.

**2884.** An indorsed note was discounted by a bank for the drawer, at maturity he took it up by a similar note on which the indorsements were forged, and destroyed the original note; he took up the second note by another note with forged indorsements. *Held*, that taking the last two notes in renewal did not extinguish the original note. The record of the protesting notary being proved to contain a true copy of the first note, was admissible in evidence. The bank who discounted the first note was entitled to recover, on proof of its destruction and the genuineness of the signatures. *Ritter v. Singmaster*, 73 Penn. 400.

**2885.** Purchaser of a mortgage from the assignee of a mortgage is put on inquiry as to his vendor's title, by the latter's failure to transfer all the securities. An assignment of a mortgage does not transfer undelivered collateral securities unless the parties so intend and a consideration is paid. *Fletcher v. Carpenter*, 37 Mich. 412.

**2886.** A note was given for additional stock in a manufacturing company. *Held*, that evidence of a parol agreement when the note was executed that it was not to be paid except on a contingency, was inadmissible.

**2887.** Hacker subscribed for additional stock in a corporation and she gave her note for the amount; a certificate was tendered her and refused, and no credit was given her in the stock ledger. *Held*, the note was not without consideration; she had the right to demand and receive the stock. *Hacker v. National Oil Co.*, 73 Penn. St. 93.

**2888.** If the protest for the non-payment of a promissory note be premature, or if time be given by the holder to the maker, the indorser is discharged, but if, with a knowledge of the protest having been made or of the giving of time, he, the indorser, subsequently promises to pay, his liability is revived. *The City Bank v. Hunter & Maitland*, 2 Rev. de Leg. 171, Q. B. 1847.

**2889.** A promissory note not yet due does not constitute a debt within the meaning of section 63 of the common Law Procedure Act, 1856, which can be attached to answer a judgment debt. Motion to attach the amount of a promissory note. Plaintiff had, in October, 1876, obtained a judgment against the defendant for £73. 19s. 11d., which was still unsatisfied. The promissory note, the amount of which was sought to be attached, had been passed by one John Griffin to the defendant for the sum of £100, payable on the 28th of February, 1877, and consequently not due at the time of the present motion. The note was in the hands of the defendant, and it was deposed that Griffin was liable to the payee in the amount thereof. *Morris, C. J.*—You have no case of such an order made in this country to attach the amount of a promissory note. *Keogh, J.*—I have refused similar applications on several occasions. *Lawson, J.*—This being a negotiable instrument, no order can prevent its being indorsed over. *Morris, C. J.* said further—What evidence of a debt is there in a promissory note? There may have been no consideration. We will not make a precedent. Motion refused. *Pyne v. Kinna*, Irish Reports, Common Law Series, Vol. 11, p. 40.

**2890.** A note was, "twelve months after date (or before, if made out of the sale of"—a machine), "I promise to pay to J. F. Huston or bearer" etc. *Held*, to be negotiable. A note to be negotiable must be for the payment of money at a fixed period on an event which must inevitably happen. *Ibid*.

**2891.** A note is not negotiable if its payment depends upon a contingency, although that may in fact happen. *Ibid*.

**2892.** A note may be negotiable if payable *certainly* at a fixed time, although subject to a contingency under which it may become due earlier. *Ibid*. *Ernst v. Steckman*, 74 Penn. St. Repts. 13.

**2893.** The sale and delivery of a negotiable promissory note with indorsement thereon are a warranty of the genuineness of the indorsements. *Allen v. Clark*, 49 Rowell, Vt. 390.

**2894.** By the general commercial law a promissory note does not extinguish the debt for which it is given, unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. *The Kemball*, 3 Wall. U. S. 37.

**2895.** An instrument executed by plaintiff in this form, "Received of D. M. Peyser five hundred dollars due on demand," was set up as a counterclaim; *held*, that it was open to explanation as to its consideration, and the circumstances under which it was given; and that, evidence having been received without objection, tending to show that it was given upon payment by Peyser to plaintiff of the sum specified, which was then due from the former to the latter, and was intended simply as a receipt, a submission of the question to the jury, and a finding to that effect were justified. *De Lavallette v. Wendt*, 75 N. Y. 579.

**2896.** This action was brought by the assignees in bankruptcy, of the members of the firm of P. & Co., to recover the value of three notes and certain insurance scrip, alleged to have been transferred to defendant in violation of the Bankrupt Law. The following facts appeared on the trial: Defendant was the New York correspondent of said firm, who were private bankers, doing business at Watertown; said firm became indebted to defendant upon overdrafts and indorsed paper, which indebtedness gradually increased up to November, 1874. Defendant, thereafter, gave no fresh credits, and made repeated efforts, without success, to reduce this indebtedness. In December, defendant refused to pay checks of P. & Co.; drafts drawn by said firm, and a firm note held by defendant were protested. In June, 1874, P. & Co. deposited with defendant certain notes as collateral for a loan, a part of which were sent by defendant, in December, to P. & Co. for collection, upon their promise to remit when collected. On January 8, 1875, defendant was advised by P. & Co. that they had delivered certain of said notes to another party, crediting themselves, on account thereof, with two drafts drawn by defendant upon them. This claim, to so credit the drafts, was wholly unwarranted; defendant wrote the next day repudiating it, and demanding a return of the notes or immediate remittance; and, on January eleventh, sent a special messenger, to whom P. delivered the next day the three notes in question, which be-



longed to his firm, and the insurance scrip, which belonged to himself, and, also, the residue of the notes sent for collection; the new securities were received in place of the notes so disposed of by P. & Co., and were of considerable less value. P. & Co. were at the time insolvent; they suspended business January sixteenth. *Held*, that the evidence justified a finding that defendant knew, or had reasonable cause to believe, at the time it received the securities in question, that P. & Co. were insolvent; also, that the transaction could not be considered as an exchange of securities, but a settlement of a claim for the conversion of the diverted notes; and that, defendant having taken the securities with knowledge of the insolvency, it was an unlawful preference within the provisions of the Bankrupt Act. *Upham v. N. Y. L. & T. Co.*, 76 N. Y. 1.

**2897.** Where, upon the maturity of a promissory note given for a usurious loan, for the purpose of an extension, the borrower delivers to the lender a new note, by its terms made payable to a third person, which note is transferred by the lender to said third person, it is tainted with the usury, and is void in the hands of the payee, although he received the same in good faith and without knowledge of the usury. *Treadwell v. Archer*, 76 N. Y. 196.

**2898.** The new note being taken by the usurer is equally void, as if it had been taken in his own name; and the maker is not estopped by the fact that the promise is in form made direct to the holder. *Treadwell v. Archer*, 76 N. Y. 196.

**2899.** It seems, that if the note had been taken, under the same circumstances of innocence, directly from the maker to the payee, in pursuance of an agreement to take it in discharge of a debt due to him from the lender, the maker would be estopped, and the payee could recover upon the note. *Treadwell v. Archer*, 76 N. Y. 196.

**2900.** Where, at the time of the execution of a promissory note, in the usual form, by a married woman, she executes another paper appended thereto, declaring her intent to charge her separate estate with the payment of the note, the two instruments are to be construed as one, and the note may be enforced against her. *Treadwell v. Archer*, 76 N. Y. 196.

**2901.** In an action upon a promissory note, where the makers allege and prove, that the note was executed for the accommodation of the indorser, and was by the latter fraudulently diverted from the use intended, the burden is upon the defendant to show that he is a *bona fide* holder for value, without notice. *Nickerson v. Ruger*, 76 N. Y. 279.

**2902.** In an action upon a note the makers admitted the execution thereof by them, but denied the indorsement by the payee, and alleged that the note was not made for value, but was fraudulently obtained by the payee, and that the plaintiff was not a holder for value. On the trial plaintiff's bookkeeper, called by them as a witness to prove the indorsement, on cross-examination, testified, in substance, that he received the note before maturity, and that he gave nothing when he received it. On re-direct examination he testified, that for the note he surrendered, a short time after he received it, two other notes of the payees held by plaintiffs, which had been protested. Defendants offered to prove that the note was given without consideration, it hav-

ing been sent by them to the payee to take up another note given as collateral security, for his accommodation, and that he did not take up the other note; this was objected to, upon the ground that defendants had not laid any foundation for the evidence, by showing that plaintiffs were not innocent holders for value. The objection was sustained. *Held*, error; that if the offered proof had been made the burden would have been cast upon plaintiffs to show that they were *bona fide* holders for value; and that defendants did not lose the benefit of their exceptions by giving other evidence in an ineffectual attempt to lay a foundation for the rejected testimony in accordance with the ruling of the court. *Nickerson v. Ruger*, 76 N. Y. 279.

**2903.** A notice to a member of a firm, indorsers of certain promissory notes, that the makers have, on demand, refused payment, is good if sent to what had been the place of business of the firm, where its affairs are actually in process of settlement under a trust deed of assignment, the firm being insolvent; it being the place where the member expected that notices and letters would be sent to him, and had arranged that if sent there they should be handed to his counsel to be forwarded to him, and there was no other place of business of the firm, or of the member, and he had absconded. And notice so sent is good, although the court finds that the member's family was residing in a town which was the member's domicile, because he intended to return there when he thought he was safe from arrest. *Bank of America v. Shaw*, 7 N. E. Rep. 779, Mass. July, 1886. Citing: *Chateau v. Webster*, 6 Metc. Mass.; *Young v. Durgin*, 15 Gray, 264; *Bliss v. Nichols*, 12 Allen, 443; *Callahan v. Bank of Kentucky*, 6 Ky. Law Rep. Oct. 1884. Contra: *Parsons' Bills & Notes*, 499, 450; *Story on Bills*, §§ 305, 389; *Chitty on Bills*, 228; *Daniel on Neg. Inst.*, § 1002, § 2, p. 998; *Exparte Moline*, 19 Ves. 216; *Robs. Bankr.* 178; *Fassin v. Hubbard*, 55 N. Y. 465; *Wilkins v. Com. Bank*, 6 How. (Miss.) 217; *Bank of Auburn v. Putnam*, 3 Keyes, 344; *House v. Vinton Co., Natl. Bank*, (Ohio,) 1 N. E. Rep. 129; *In re Bellman*, L. R. 4 Ch. Div. 795; *Byles on Bills*, 216.

**2904.** A promissory note is evidence of indebtedness and the substitution of one note for another does not discharge the debt evidenced thereby, nor release the security given for its payment, as between the immediate parties it is competent for them to change the time and mode of payment and still retain the mortgage security. *Williams v. Starr*, 5 Wis. 534.

**2905.** Any material erasure or interlineation in a note will vitiate it unless explained—not so if it be wholly immaterial. *Williams v. Starr*, 5 Wis. 534.

**2906.** Bill notes—when a contract under seal must be so recited in body thereof. Mere addition of scroll after signature insufficient. *Skrine v. Lewis*, 66 Ga.

**2907.** Parol evidence is admissible to show want or failure of consideration of note. *Oertel v. Schroeter*, 48 Ill.

**2908.** In an action by a national bank upon a promissory note, one count of the answer alleged, in substance that the note was presented by its makers to plaintiff for discount for their sole benefit which was known to the plaintiff; that it discounted the note and "then and there, knowingly, corruptly and usuriously deducted therefrom



and took, received, reserved and charged by way of discount \* \* \* \* \* for the loan and forbearance of the sum of money secured by said note" a sum of money much greater than seven per cent., for the time the note had to run, \* \* \* \* \* and asked that the interest paid, and that which the note carried with it should be adjudged to be forfeited. *Held*, that said count sufficiently set forth a corrupt and usurious agreement and was good as a plea of usury, that the facts stated established a case within the meaning and intent of the provisions of the National Banking Act in reference to usury \* authorizing forfeiture of the interest and that the same was available as a defence by way of set-off or rebatement; and that the recovery should be limited to the money actually loaned without interest. To create a forfeiture under said provision it is sufficient that the usurious interest has been taken, received or charged; the provision is not limited to cases where the note upon its face carries interest with it. An accommodation indorser has the same right as the maker to the benefit of the forfeiture given by said act by way of set-off or rebatement when sued alone upon his indorsement. Where the note in suit is the last of a series of renewed notes, the original loan being usurious, the taint of usury affects the whole; the forfeiture of the entire interest follows and credit must be given for all the interest which has been paid from the beginning of the transaction. *Nat. Bank of Auburn v. Lewis*, 75 N. Y. 516; modified on reargument, 81 N. Y. 15 q. r.

**2909.** Presumption of delivery by the maker arising from the possession and production of a promissory note by the payee is very much weakened if not destroyed in case where maker is dead and the payee one of his executors, and such possession is not shown to antedate the possession of all the maker's papers and effects by the payee, and where the note appears to be all in the handwriting of the decedent and to have been taken with stub attached also in his handwriting from a blank book belonging to him and where installments of interest falling due in the maker's lifetime were not paid, and although years elapsed after they so became due before his death, there is no proof of demand upon or of recognition of liability by the payee. *Cowee v. Cornell*, 75 N. Y. 91; *Stettheimer v. Killip*; *Ibid.* 282.

**2910.** A promissory note payable on demand is barred by the statute of limitations at the expiration of six years from its date. *De Lavallette v. Wendt*, 75 N. Y. 579.

**2911.** A note for \$20,000 was transferred to plaintiff after the death of the payee, plaintiff giving therefor his own note for \$19,000, payable in one year from date which note was still in the possession of the payee. *Held*, that plaintiff was not a *bona fide* purchaser for value and that the consideration of the note was open to inquiry; but that where the parties dealt upon equal terms mere inadequacy of consideration was not a matter with which the Court will interfere. *Cowee v. Cornell*, 75 N. Y. 92.

**2912.** The right of a creditor having two demands against his debtor to apply a payment received from the latter to either, provided no direction is given is not affected by equities existing between the

debtor and a third person of which the creditor had no notice. The mere fact that there is a surety for one of the debts does not preclude the creditor from applying a payment so received to the debt for which he has no security. *Harding v. Tift*, 75 N. Y. 461.

**2913.** The note in suit was for \$1,000 payable with interest at six per cent. Plaintiff was permitted to prove statement of the deceased made soon after the date of note to the effect that he had borrowed \$1,000 of plaintiff and given his note for it at six per cent. *Held*, no error. *Bardin v. Stevenson*, 75 N. Y. 164.

**2914.** Where the genuineness of a signature is in question in an action, experts in handwriting who have no other knowledge of the handwriting of the person whose signature the one in question purports to be, than that derived by a comparison in court of such signature with other signatures of the person to instruments proved and properly in evidence, are competent as witnesses to give their opinion, derived from such comparison, as to the genuineness of the disputed signature, and as to whether it appears a natural or simulated hand. *Miles v. Loomis*, 75 N. Y. 287.

**2915.** Where in an action upon a promissory note indorsed by defendant for the accommodation of S. & H., defendant offered to prove that a sum of money paid by S. to plaintiff without direction as to application, and which was applied by plaintiff upon another note made by S. & H. held by him, was raised by the makers upon a note indorsed by defendant for the purpose of having the proceeds applied upon the note in suit. *Held*, that in the absence of proof, or of an offer to prove, that knowledge of this fact was communicated to plaintiff, the evidence was properly excluded. *Harding v. Tift*, 75 N. Y. 461.

**2916.** By the statute of Illinois, the assignor of a promissory note is liable on his contract of assignment, only in case the assignee has, by the exercise of due diligence, obtained judgment against the maker, and a return of *nulla bona*, unless such suit would have been impracticable or unavailing. *Wills, et al. v. Claflin, et al.*, 92 U. S. 135.

## PROTESTS.

**2917.** The husband being universal legatee of his wife indorsed for her a promissory note. *Held*, that he was bound to pay the amount of the note, notwithstanding there was no protest, it being sufficiently established that he had consented in the name of his wife to waive protest in order to avoid costs, and that in fact the wife was only a *dret nom* to cover the trading of the husband. *Berian v. McCorkill*, 14 L. C. R. 400, Q. B. 1864.

**2918.** In an action against the maker and indorser: *Held*, that the omission to state in a notarial protest that it was made in the forenoon of the day of protest was fatal, and the indorser was discharged. *Joseph v. Delisle, et al.*, 1 L. C. R. 244, S. C. 1851; 2319 C. C.

**2919.** *Held*, that the non-exhibition of the note to the maker at the time of protest, the maker being notoriously insolvent, will not invalidate the protest, and notice of protest to the indorser will hold



them liable, notwithstanding such non-exhibition. *Venner v. Futvoye, et al.*, 13 L. C. R. 307; S. C. 1863.

**2920.** The maker of a note was described in the protest, and also in the writ and declaration, as E. B. P., instead of Joseph B. P. *Held*, that a plea by the indorser to the effect that he never indorsed the note described by plaintiff, and that a protest of E. B. P.'s note was not a legal protest of J. B. P.'s note was bad, and would be dismissed. *Scullion v. Perry, et al.*, 9 L. C. J. 175, 1 L. C. L. J. 64, S. C. 1865.

**2921.** A promise to pay a protested bill of exchange, of which no notice of protest has been given, if made with a knowledge of that fact, is a waiver of want of notice. *Ross v. Wilson*, 2 Rev. de Leg. 28 K. B., 1812.

**2922.** In the case of a protest of a note dated at Montreal and payable at a bank in Albany, in the State of New York, a notice of protest mailed at Albany, addressed to an indorser at Montreal, protest being made, and notice mailed according to the laws of the State. *Held*, confirming court below, that it was not sufficient, inasmuch as the postal arrangements between the two countries required prepayment of the postage, at least from Albany to the line; but, had the postage been paid, the notice would have been sufficient, as notice of protest must be given, according to the *lex loci contractus*, but the protest itself made according to the law of the place where the note was payable. *Howard v. Sabourin*, 2 L. C. R. 121, and 5 L. C. R. 45, Q. B. 1854.

**2923.** Protested draft is not an obligation within the meaning of the proviso of the Act of 16th of April, 1850, which declares that the assignees of an insolvent bank "shall receive in payment of debts due to said bank its own notes and obligations and the checks of its depositors at par." *Basehou v. Rhodes*, 85 Penn. 44.

**2924.** Notice of dishonor of a promissory note, where the parties live in different places between which there is a communication by mail, and several mails each day, must be posted by the first practicable and convenient mail of the next day after dishonor or notice of dishonor. *Smith v. Poillon*, 87 N. Y. 590.

**2925.** Ordinary and reasonable diligence, however, only is required, and as to what is the first practicable and convenient mail depends upon circumstances and may be controlled by usage and the condition, situation and business engagements of the party required to give notice. *Smith v. Poillon*, 87 N. Y. 590.

**2926.** Whether sufficient diligence has been shown, the facts being undisputed, is a question of law. *Smith v. Poillon*, 87 N. Y. 590.

**2927.** In an action by a second against the first indorser upon a promissory note, made in the city of New York by a foreign corporation, payable at its office three years after date, it appeared by plaintiff's evidence, that the note was on the last day of grace presented for payment by a notary at an office in said city, where the corporation either then or a short time before had its office, and upon which was a sign indicating that it was the company's office. Payment was demanded of the person in charge, and the note was protested for non-payment. Defendant's evidence tended to show that said office was the last office occupied by the company in this State, but at the time of demand it had ceased to be such office. *Held*, that a defence based

upon the ground of want of proper presentation and demand was untenable; that if the office, when demand was made, was the office of the company, presentment was properly made there; if not then the office, as it was its last office, and as the corporation had removed its office and left the State, no presentment and demand in any place was necessary to charge the indorsers. *Smith v. Poillon*, 87 N. Y. 590.

**2928.** Also, *held*, that the last proposition was unaffected by the fact that the complaint alleged presentment and demand; this did not preclude proof that presentment and demand had been waived or rendered unnecessary. *Smith v. Poillon*, 87 N. Y. 590.

**2929.** It appeared that the note was protested March 3, 1873. On the next morning the notary caused notices to be drawn up, which he signed, one to defendants, the first indorsers, one to S., plaintiff's testator, the second indorser, and one to R., cashier of a bank at T., in Maine, the last indorser. These notices the notary inclosed in an envelope directed to R. at T., and gave the package to his clerk before 2 P. M. to mail in the New York post office. It was the duty of the clerk to mail letters so delivered, and he had been in the habit of so doing for years. The clerk, as a witness, testified that he had no particular recollection of this letter, but that he mailed notices of protest between 1 and 2 P. M. that day, and all the letters that were given him. Letters mailed at the time specified, if the train made connection at Boston, would reach T. on the evening of March 5th; if not, they would reach T. at noon of the 6th. The notices reached their address March 5th or 6th, and R. by the next mail mailed to S. at W., his place of residence, the notice addressed to him and to defendants. They were received by S. on the evening of March 6th. There were two mails daily between T. and W., a distance of four miles, one leaving at 10 A. M., the other at 1:40 P. M. *Held*, that the evidence established that the notices were mailed in time at N. Y., and left no question for the jury. *Smith v. Poillon*, 87 N. Y. 590.

**2930.** S., who was over eighty years of age, on the morning of March 7th went to T. to consult counsel, and there mailed to defendants the notice addressed to them at N. Y., by the mail leaving at 1:40 P. M., which passed through W. at 2 P. M. The first mail leaving T. at 10:10 A. M. closed at W. at 9:30 A. M. *Held*, there was no error in holding, as matter of law, that due diligence was used by S. in posting the notice. *Smith v. Poillon*, 87 N. Y. 590.

**2931.** In an action against an accommodation indorser of a negotiable note, the fact that the indorser resided at the time in Alexandria, where the note was discounted, and before the note became due he went into the Confederate lines, and was there when the note was protested, and at the time of such protest he had no known agent in Alexandria to receive notice of the dishonor of the note, is not of itself sufficient to render the indorser liable.

**2932.** And in such a case, the fact that the indorser had a residence in Alexandria at the time the note was protested, and that a written notice of said protest was left at his residence, is not sufficient to render the indorser liable.

**2933.** In such a case the plaintiff having purchased the note after maturity and dishonor, by purchase at a sale of the effects of a bank which had discounted it, he is not thereby prevented from recovering



from the indorser the whole amount of the note, though he paid for it much less than the nominal amount. *McVeigh, et al. v. Allen*, 29 Grattan (Va.) 588.

**2934.** Notice of protest addressed to a female indorser and beginning "Sir" is bad, and an action against such indorser was dismissed. *Seymour, et al. v. Wright, et al.*, 3 L. C. R. 454, S. C. 1852. But, *held*, in a later case, to be sufficient if duly served upon her. *Mitchell v. Browne*, 9 L. C. J. 168, and 15 L. C. R. 425, C. C. 1865.

**2935.** There must be evidence of diligence of a protest for non-payment of a bill of exchange to charge the drawer. *Brent v. Lees*, 2 Rev. de Leg. 335, K. B. 1820.

**2936.** Notice of dishonor need not be given by a notary, it may be given by any holder for himself and in his own language; but it is not binding, whatever its form, unless the paper has been legally dishonored; and every indorser is presumed to know what action will bind him and what will not. A letter addressed by the holders of a note to the indorser, describing the note and stating that it was unpaid and that the holders looked to him for payment is a sufficient notice of dishonor. *Cromer v. Platt, et al.*, 37 Mich. 132.

**2937.** It is incumbent upon a party seeking to charge an indorser, to prove a legal notice, but this, like any other question of fact, is to be settled upon the testimony as it is given, and need not be proved beyond the possibility of mistake. *Seaton v. Scovill*, 18 Kansas, 433.

**2938.** Where the holder, and party to whom notice is to be given, reside at different places, it is generally sufficient if notice is sent by the mail of the day next succeeding the day of dishonor. *Ibid.*

**2939.** The holder of dishonored paper may give notice directly to all prior parties, or only to his immediate predecessor on the paper. In the latter case, such predecessor has the same time to give notice to his indorser as though he himself had been the holder and had the paper protested. *Ibid.*

**2940.** A banker or agent to whom paper has been transmitted for the purpose of obtaining acceptance, or payment, is, so far as the question of notice is concerned, to be considered as though he were the real holder, and his principal a prior indorser. *Ibid.*

**2941.** Where a promissory note provides that the indorsers "waive presentment for payment, protest, and notice of protest and non-payment," the complaint in an action thereon need not allege "presentment," or "notice." *Henderson v. Ackelmire*, 59 Ind. 540.

**2942.** Where such note waives notice of non-payment, protest, etc., the complaint thereon need not aver such notice to an indorser. *Burroughs v. Wilson*, 85 Ill. 536.

**2943.** The defendant was sued as indorser on a note. Seasonable notice of its non-payment was sent to his address at Baldwin, where he had formerly long resided; but at, and for several years preceding the maturity of this note, he lived at Denmark. There were three post offices in Baldwin, neither of which was designated simply by the name of the town; but notice of the dishonor of a note maturing earlier at the same bank, addressed to him at Baldwin (as this was) was received and responded to, without any intimation that it was not

properly directed; and upon inquiry of those likely to know, the notary was told he still lived at Baldwin; *Held*, that the plaintiff's allegation of notice was sufficiently proved, since legal notice is not, necessarily, actual notice. Reasonable diligence to communicate information of the non-payment of the note is all that is required, and that was issued in this case. *Saco Nat. Bank v. Sanborn*, 63 Maine, 340.

**2944.** The accommodation indorser of a promissory note wrote the cashier of the bank where the note was made payable, on the day the note fell due, the note then being in the hands of an indorsee for value, and the bank being ignorant of its existence, that he would "waive protest" thereon. Afterwards, the indorsee indorsed the note to the bank for collection, and the bank brought suit thereon against the accommodation indorser. *Held*, that as at the time the letter was written and received the bank had no interest in or possession of the note, the letter was not, in legal effect, a waiver of notice of protest. *Nat. Bank of Poultney v. Lewis*, 50 Vt. 622.

**2945.** The indorsement on a note, "I hereby guarantee the payment of the within note without protest," is an express waiver of demand and notice of non-payment and releases the indorser. *Bank v. Hartman*, 110 Penn. 196.

**2946.** His guaranty, alleged to have been given to the bank before the maturity of the note, was virtually a waiver of protest so far as he was concerned. *Hartman v. The Bank*, 103 Penn. 581.

**2947.** Neither protest, nor notice to the surety of non-payment by his principal, is necessary to bind a surety on a promissory note payable in bank. *Scott v. Shirk*, 60 Ind. 160.

**2948.** Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonor. *Turner v. Samson*, Queen's Bench, Court of Appeal, 1876, English Reports, 195.

**2949.** Notice to the person named in a will as executor of the non-payment of a promissory note indorsed by his testator, which became payable after the will had been offered for probate, and letters testamentary applied for, and before the executor named declined to accept the trust, is sufficient to charge the estate; but such notice of the non-payment of a note, which matured after the executor had renounced the trust, and a special administrator had been appointed, is not sufficient, although no public notice of the latter's appointment has been ordered or given. *Goodnow v. Warren*, 122 Mass. 79.

**2950.** When an indorser of a promissory note dies before the note matures, notice of dishonor to his personal representatives is sufficient to support a claim on the indorsement against his heirs and devisees, without notice to them. Notice served by the notary upon a person in charge of the administrator's usual place of business, is legal service, and its validity is not impaired by the notice not being addressed to the decedent. When the notary knows of the indorser's death, and knows who and where his personal representatives are, a service of notice by mail, addressed to "executors," "administrators," or "personal representatives," is not sufficient. They should be addressed by name, and not by their office merely. *Smalley v. Wright*, 40 N. J. L. R. 471.



**2951.** One who is publicly acting as the deputy of a notary, and whose oath of office has been administered by the notary himself, is qualified to make demand of payment, and perform the other functions of a deputy notary. *Buckley v. Seymour*, 30 La. 1341.

**2952.** The record of the proceedings of a notary public on the protest of a promissory note, unless verified by his affidavit, is incompetent as evidence; but if no objection be made when it is offered in evidence, the objection cannot be raised on a motion for a new trial, nor on writ of error. *Etheridge v. Gallagher*, 55 Miss. 458.

**2953.** In an action against an indorser of a promissory note, proof that notice of protest was duly mailed and directed to him at a certain place, if there be no evidence that it is his place of residence or of business, or his nearest post office, or the one where he receives his mail, is not sufficient proof of the notice required. If the indorser had no known place or residence or of business, notice to him was not necessary; but this fact must be shown in evidence. *Ibid.*

**2954.** Where a note fell due on the 25th of July, 1873, on which day it was duly presented for payment and protested, but the notice of protest, dated on the 26th, incorrectly stated that the note was this day presented and protested. *Held*, that the notice was sufficient, as it did not appear that the indorser was misled by the mistake. *Cassidy v. Mansfield*, 24 Upper Canada Com. Pleas Rpts. 383.

**2955.** Two promissory notes, payable at any bank in Boston, were presented when due, one at the North National Bank, the other at the Webster National Bank, and demanded their payment, and the same was refused; the answer to the demand being "No funds," and thereupon the notary mailed to the defendant notices of the demand, non-payment and protest of said promissory notes (which notices, it was agreed, were sufficient in form), addressed to the defendant at Townsend, Mass., where was the principal post office in the town in which he lived. It was proved that the indorser usually received his letters at the West Townsend post office, and that the plaintiff knew that he lived and that there was a post office at West Townsend, and had visited and done business with the indorser there. There was no evidence at the trial that these notices were received by the defendant within three days of the time when they were mailed to him by the notary, or that he otherwise within that time had notice of such demand, non-payment and protest. *Held*, the holder of a promissory note is bound to use reasonable diligence to give the indorser immediate notice of its dishonor. It is *prima facie* sufficient to address the indorser by mail at the town in which he resides, although there are several post offices in the town, and he receives his letters at one nearer his residence and place of business than the principal post office, unless the holder knows, or with reasonable diligence might have known, this fact. *Held*, that the judge, sitting without a jury, was warranted in ruling that the notice was insufficient. *Roberts v. Taft*, 120 Mass. 169.

## PURCHASER.

**2956.** Purchasers at public judicial sales or under a quit-claim deed usually buy at their own risk of the regularity of title. *McGoren v. Avery*, 37 Mich. 120.

**2957.** A purchaser of land with notice of outstanding equities may protect himself by purchasing the title of another who was a *bona fide* purchaser, and this will not make him hold the property as a trustee. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

**2958.** A creditor who makes advances under the security of a deed of trust, in good faith, and without notice of a vendor's equitable lien for the purchase money, will be protected as an innocent purchaser. He should show that the vendor was seized in fee and in possession of the land. *Gerron v. Pool*, 31 Ark. 85.

**2959.** W. conveyed to E. an undivided half part of two lots of land, and subsequently received from E. a bond in a penal sum of \$4,000, giving W. the privilege at any time at his option within seven years from the date of the bond, to purchase the whole of said two estates for \$8,000, provided that on such purchase E. should be by W. exonerated from all liabilities and losses, past and future, of a firm whereof E. was a member. W. died without having availed himself of the option, and more than three years before the expiration of the time prescribed. E. became his administrator. The widow and children of W. filed a bill against E., charging fraudulent concealment of the bond. E. produced the bond, denying in his answer the charges of the bill, whereupon the complainants asked leave to amend the bill by a prayer that E.'s title to the estate in question might be declared that of a mortgage for \$8,000; that the estate might be sold to satisfy E.'s claim, and that an account might be ordered. *Held*, that the option of purchase given to W. by the bond was neither a chose in action, nor a transmissible right of property, but a personal privilege in W., and that on his death E. was freed from the bond. *Held*, further, that a purchase under the option by the administrator of W. must, if made, be for and in the name of W.'s heirs; but as this might change the succession to W.'s property, W.'s administrator could not be allowed the option given W. *Held*, further, that in no case could the exoneration required by the bond be given by the administrator. *Newton v. Newton*, 11 R. I. 390.

**2960.** A person to be a *bona fide* purchaser without notice, must be without notice of the rights and equities sought to be enforced at the time of the payment of the consideration. *Marsh v. Armstrong*, 20 Minn. 81.

**2961.** Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency. Where the vendors were also warehousemen of the goods sold under an arrangement with the purchasers to pay warehouse rent: *Held*, that as the goods remained in the possession of the vendors and no actual delivery had been made to the purchaser, the vendor's lien revived upon the insolvency of the vendees. *Grice v. Richardson*, 3 App. Cas. (Vic. 41-42, Eng. Law Reports) P. C. 319.



**2962.** A creditor taking a chose in action as collateral security for a preëxisting indebtedness is not a purchaser for value. *Ashton's Appeal*, 73 Penn. 153. Although a rule to open a judgment and let the defendant in to a defence has been discharged in a court of law, the defendant is not precluded from resorting to a court of equity for relief. *Ibid.*

**2963.** Where the plaintiff purchased and paid for the land in question, and the deed made to the defendant J., under a verbal agreement that the plaintiff was to hold the deed, and that, concurrently with taking the deed to J., he and his wife were to execute a mortgage to the plaintiff to secure the purchase money; J. did execute the mortgage, but his wife refused to join. *Held*, that the plaintiff was entitled to judgment for the amount due and that the land be sold to satisfy it. *Held, further*, that in such case no title vested in J., and his wife acquired no dower or homestead rights. *Held, further*, that plaintiff's demand is for the purchase money, as against which homestead rights do not prevail. *Bunting v. Jones*, 78 N. C. 242; also, *Suit v. Suit*, 78 N. C. 272.

## RECEIPTS.

**2964.** An instrument given by the payee of a lost note, upon the execution of another note in its stead by the maker, stipulating that if the lost note comes to hand it shall be null and void, is a receipt, and may be contradicted or explained by parol evidence. *Williamson v. Reddish*, 45 Iowa, 550; also, *Price v. Mahoney*, 24 Iowa, 582.

**2965.** Receipts may be explained or contradicted by parol evidence. *Dunlap's Ex'r v. Shanklin*, 10 West Virginia, 662.

**2966.** Receipt of bank check is not payment of antecedent debt until it is itself paid. *Phillips v. Bullard*, 58 Ga. 256.

**2967.** Receipt under seal, given by obligee to joint obligor "in full satisfaction for his liability" upon the obligation, releases the co-obligors, if the receipt itself does not show a contrary intention. *Hall v. Spaulding*, 45 Mass. 482.

## RECEIVER.

**2968.** A receiver of an insurance company, holding notes given to the company and secured by deed of trust, has the rightful power to bid off the property to save a sacrifice. He succeeds to the rights of the company in this respect. *Jacobs v. Turpin*, 83 Ill. 424.

**2969.** Where a creditor's bill charges that the debtor has choses in action, etc., in his possession, and asks for a discovery, and the debtor suffers the bill to be taken as confessed, it is not error to enjoin the debtor from disposing of his property, and to appoint a receiver to take charge of the same. *Runals v. Harding, et al.*, 83 Ill. 75.

**2970.** Receiver of a bank, appointed under Gen. Stat. R. I. cap. 140, may bring suit in his own name for a debt due to the bank. *De Wolf v. Sprague Manuf. Co.*, 11 R. I. 380.

**2971.** A receiver is not personally liable for torts of his employees; it is only when he commits the wrong himself. Proceedings against a receiver for torts are of the nature of proceedings *in rem* and render the property held by him as receiver liable in compensation for such injuries. *Davis v. Duncan*, U. S. Circuit Ct. So Dist. Miss. March, 1884, vide, 18 Cent. Law Jour. 248; *O'Meara v. Halbrook*, 20 Ohio State, 137; *Kline v. Jewett*, 11 C. E. Greene, 474; *Jordan v. Wells*, 3 Woods, 527; *Kennedy v. R. R.*, 11 Cent. Law Jour. 89.

**2972.** A sale of property under an execution without leave of the court, while the property is in the possession of a receiver, is illegal and void, although the levy was made before the appointment of the receiver. *Walling v. Miller*, 108 N. Y. 173.

**2973.** An equitable action by a creditor of an insolvent corporation to reach assets, brought before the remedy at law has been exhausted, cannot be upheld on the ground that the appointment of a receiver is necessary to preserve the property from misappropriation and waste pending the litigation. *Adee v. Bigler*, 81 N. Y. 349.

## REDEMPTION.

**2974.** Real estate sold at sheriff's sale by virtue of a decree of foreclosure of a mortgage thereon, accompanied by a personal judgment against the debtor, may be redeemed by the judgment creditor, from the purchaser, where the amount realized by such sale is insufficient to satisfy such judgment. 2 R. S. 1876, p. 220, § 1; also, 2 R. S. 1876, p. 228, and notes on pp. 228 to 233. *The State, ex rel., etc. v. Sherill*, 34 Ind. 57; also, *Davis v. Longsdale*, 41 Ind. 399 also, *Greene v. Doane, et al.*, 57 Ind. 186.

## REPLEVIN.

**2975.** No previous demand upon a *bona fide* purchaser of a chattel from one who had no authority to sell it is necessary to enable the owner to maintain replevin. Such a person is not lawfully in possession as against the owner. *Prime v. Cobb*, 63 Maine, 200.

**2976.** A sheriff who attempts to sell goods covered by a writ of replevin previously served upon himself or his receiptor, becomes a wrongdoer. *Mayhue v. Snell*, 37 Mich. 305.

**2977.** Dillinger consigned goods to Moorehead for sale; he pledged them for a loan to Macky, who knew they were owned by Dillinger: *Held*, that under the Factor Act of April 14, 1834, Dillinger could recover in replevin without tendering repayment of the loan. *Macky v. Dillinger*, 73 Penn. p. 85. Moorehead had advanced to Dillinger on



the goods before pledging them; Dillinger demanded them from Macky, who declined to deliver without payment of his loan, saying nothing as to Moorehead's advance. Dillinger might recover the goods without payment of the advance. *Ibid.*

**2978.** Macky gave a property bond and retained the goods: *Held*, that the amount due to the advance be recouped from Dillinger's damages. *Ibid.*

**2979.** When a party declines to accept payment or performance, except in a way to which he is not entitled, he cannot insist that the action is prematurely brought. *Ibid.*

**2980.** There is no set-off in replevin, but if the goods are subject to a charge, it can be enforced by way of recoupment. *Ibid.*

### REPRESENTATIONS.

**2981.** Damages not recoverable for loss of speculative profits where money has been paid on the strength of mistaken representations. *Fitzsimmons v. Chapman*, 37 Mich. 139.

### RETROSPECTIVE.

**2982.** Act 145 of 1871 amended the statute of limitations so as to run against Canadian as well as domestic creditors, but allowed one year from time when the act would take effect for bringing suit on all claims; that it would otherwise bar action, because it clearly fixed the date of limitation. *Krone v. Krone*, 37 Mich. 308.

## SALE.

**2983.** A "dealer" is one who makes successive sales as a business. A single sale in gross of a stock of liquors, without license as a wholesale liquor dealer, is not an illegal sale avoiding a note given therefor. *Overall v. Bezeau*, 37 Mich. 506.

**2984.** The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. By a purchase in market overt the title obtained is good against all the world. If not so purchased, though purchased *bona fide*, the title obtained may not be good against the real owner. Where the original owner has parted with the chattel to A. upon a *de facto* contract, though there may be circumstances which enable that owner to set aside that contract, the *bona fide* purchaser from A. will obtain an indefeasible title. The question, therefore, in many cases will be, was there a contract between the original owner and the intermediate person. *Cundy v. Lindsay*, Eng. Law Reports, 41-42, Vic. 3 App. Cases, 459.

**2985.** Sale under the guise of a renting of personal property passes the title to the property to the vendee. When the transaction shows a sale it does not matter whether the parties intended the title to pass or not. The sale being completed by an agreement as to price and terms of payment, and delivery of possession to the vendee, the law, in furtherance of public policy and to prevent frauds, will treat the title as being where the nature of the transaction requires it should be. *Greer v. Church & Co.*, 13 Bush, Ky. 430.

**2986.** Parties considering sale complete as to price and delivery, title passes; otherwise not. *Flanders & Huguenin v. Maynard*, 58 Ga. 56.

**2987.** While it is true that it is essential to a sale that both parties should consent to it, yet the consent of the former owner need not be expressly given, but may be inferred from the circumstances of the transaction. *Ketchum v. Duncan*, 96 U. S. S. Ct. 659.

**2988.** A vendor of goods and chattels who is induced by fraudulent means to part with his property under color of a contract of purchase may disaffirm the sale and reclaim the property. In such case no title passes to the fraudulent vendee, even though delivery be made; nor will execution creditors, or purchasers, or mortgagees from the fraudulent vendee, acquire a title superior to that of the original vendor, unless they be purchasers or mortgagees *bona fide* and for a valuable consideration. *Williamson v. N. J. Southern R. R Co.*, 29 N. J. Eq. 311.

**2989.** When property which the owner has leased is sold at sheriff sale, on execution against the owner, the sheriff's deed conveys the reversion and the rent follows as an incident. *Butt v. Ellett*, 19 Wall. U. S. 544.

**2990.** There are some cases in which a valid sale may be made by virtue of power conferred by law on the vendor not being the owner of the goods sold. Thus, a sheriff may sell according to the exigency of a writ of execution, and if that writ be afterwards set aside, the vendee does not seem liable to return the goods, provided he has acted *bona fide*. *Manning's Case*, 8 Coke's Eng. Repts. 191; *Doe v. Thorn*, 1 M. & S. Eng. 425; *Lock v. Selwood*, 1 Ad. & E. Eng. 736.



**2991.** But the vendee under an invalid distress warrant issued upon a conviction, has been thought not to be similarly protected. *Ibid.*

**2992.** Where a sale of goods is made in good faith with a warranty of quality, the vendee is not bound to rescind the contract on discovery of a breach of the warranty, but may, if he elect, use the article and rely upon the warranty. *Brigg v. Hilton*, 99 N. Y. 517.

**2993.** The rule is the same whether the goods are in existence at the time of the contract of sale or are to be manufactured. *Ibid.*

**2994.** The payee of a promissory note gave to the promisor a receipt acknowledging it as given for the purchase of personal property to be delivered to the promisor on payment of his note. The note not being paid at maturity, the payee notified the promisor that he should not recognize his further claim to the property, and after a further lapse of time without hearing from him, destroyed the note. *Held*, that the sale was conditional, not to be completed until payment of the note. *Davison v. Davis*, 125 U. S. 90.

**2995.** Judicial sales may be collaterally attacked on jurisdictional grounds. *Williams v. St. Louis, Iron Mt. & Southern Ry. Co.*, 8 Mo. App. 135.

**2996.** Any person *intrusted* with, and in possession of, any bill of lading, Indian warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed to be the true owner of the goods described in the said several documents, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, or any part thereof, or the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument advanced or given upon the faith of such document if the buyer, disposses, or pawnee, has not notice by the document, or otherwise, that such person is not the actual and *bona fide* owner of the goods. *Close v. Holmes*, 2 M. & Rob. Eng. 23.

**2997.** But if such person deposit or pledge the goods as a security for a *preexisting debt or demand*, he who takes the deposit or pledge, without notice, shall acquire such right, title or interest, and no further or other than was possessed by the person making the deposit or pledge. *Bonzi v. Stewart*, 4 M. & Gr. Eng. 295; *Taylor v. Kymer*, 3 B. & Ad. Eng. 337; *Taylor v. Trueman*, 1 M. & M. Eng. 451; *Evans v. Trueman*, and *Monk v. Whittenbury*, 2 B. & Ad. Eng. 484.

**2998.** The acceptance by a vendee of articles manufactured for him under an executory contract, after an opportunity to examine, precludes him from raising any objection as to defects which were visible and capable of discovery on inspection, unless there was a warranty of quality which was intended to survive acceptance. *Norton v. Dreyfuss*, 106 N. Y. 90.

**2999.** Actual delivery of immovables in Louisiana is not essential to validity of a sale of them made by public act before a notary. *Conrad v. Waples*, 96 U. S. 279.

**3000.** Sale of lottery tickets *held* complete on selection of tickets and giving of security for price, without delivery. *Thompson v. Gray*, 1 Wheat. 75.

**3001.** In replevin of whiskey, brought by A. against C., there was

evidence that A. sold the goods in Cincinnati to B., who did business in Boston; that, by the terms of the agreement, the whiskey was to be delivered and regauged on the cars at Cincinnati, and, on receipt of an invoice of the whiskey, B. was to send to A. at New York his promissory note for the price, on three months' time, dated at Cincinnati as of the date of the delivery on the cars, and an invoice and a form of a note dated at Cincinnati, on ninety days, were sent to B.; that B. did not sign this note, but pledged the goods to C. for a valuable consideration, failed in business, and two days afterwards sent a note to A. in New York, dated at Boston, and payable three months after date; that A. replevined the whiskey in Boston on the day the note arrived in New York, and two days afterwards tendered the note to B. in Boston, who refused to receive it. *Held*, that the evidence would warrant the jury in finding that the sale was upon a condition which was broken, and that there had been no waiver of the condition; and that, if so, B. acquired no title to the goods which he could transfer to C. *Armour v. Pecker*, 123 Mass. 143.

**3002.** Possession of personal property is not title. It is *prima facie* evidence of title, but nothing more, and will not protect one who buys on the faith of it against the holder of the title. *Ketchum v. Cummings*, 53 Miss. 596.

**3003.** A sale of goods in the hands of a bailee is good against an execution creditor, if the vendor do not retake possession. *Worman v. Kramer*, 73 Penn. 378.

**3004.** Faust's property was about to be sold by the sheriff; an attorney by arrangement with Faust and a judgment-creditor agreed to buy it for Faust; under this it was struck down to the attorney; it was afterwards agreed that Haas, another judgment-creditor, whom the proceeds would reach, should pay the purchase-money to the sheriff, take the deed and give Faust a time named to repay him. Under this arrangement the deed was made to Haas under the direction of the purchaser; Haas claimed to hold the property: *Held*, that he was trustee *ex maleficio* for Faust. Where artifice or trick are resorted to to procure property at sheriff's sale at an under value, the purchaser takes as trustee for person misled. *Faust v. Haas*, 73 Penn. St. 295.

**3005.** A sale of goods which is not accompanied by immediate delivery, and followed by actual and continued change of possession, as required by section 14 of Statute of Frauds, R. S. 339, is void as against the creditors of the vendor. *McCraw v. Welch*, 2 Colorado, 284.

**3006.** Where a sale has been so far completed that the vendee has bought and received the goods, the vendor cannot hold him to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it as that "no claims for deficiencies or imperfections will be allowed, unless notice thereof is given within seven days from the day in which the goods were received." *Schuchardt v. Stanley*, 1 Wall. U. S.

**3007.** Where a creditor, who has bought certain movables from his debtor, by crediting the latter on his account with the price of the movables, instantly resells the property to the debtor, the sale will be valid, as between them, whether any delivery was made to the creditor or not. *Edward J. Gay & Co. v. Crichlow & Donelson, et al.*, 29 La. 122.



**3008.** The vendor of an article sold for a particular purpose does not impliedly warrant it against latent defects to him unknown, and caused by the unskillfulness or negligence of the manufacturer or previous owner, except where the sale is in itself equivalent to an affirmation that the article has certain inherent qualities inconsistent with the alleged defects. *Bragg v. Morrill*, 49 Rowell, Vt. p. 45.

**3009.** On a sale of personal property by a debtor, there must be a real, permanent delivery and change of possession, to enable the purchaser to hold the same against an officer levying an execution upon it for the debt of the vendor. *Allen v. Carr*, 85 Ill. 388.

**3010.** A sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed. *Aultman v. Mallory*, 5 Neb. 178.

**3011.** Representations by the vendor, of the quality of the thing sold or of its fitness for a particular purpose, intended as a part of the contract of sale and relied upon by the vendee, constitute a contract of warranty. And when there is such contract, the vendee has a right of action, by proving the contract and its breaches, and is under no obligation to return the property or to give notice of its defects; his retention and use of it, and neglect to give notice of its defects, being material only upon the question of damages. The court charged that if plaintiff kept it longer than was reasonably necessary to inspect and vest it in the respect counted upon, without giving notice of any defect, he had impliedly accepted it. *Richardson v. Grandy, et al.*, 49 Rowell, Vt. 22.

**3012.** A pretended sale by an insolvent debtor to one of his creditors, will be set aside on the petition of any other creditor. *Johnson v. Mayer*, 30 La. 1203.

**3013.** Where several distinct articles are brought at the same time for different prices, even if of the same general description, so that a warranty of quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold, and a right of rescission exists as to each article, if the warranty in regard to it is broken. *Young & Conant Mfg. Co. v. Waterfield*, 121 Mass. 91.

**3014.** A delivery of goods by the seller to a carrier, pursuant to the directions of the buyer, is a good delivery to the latter. *Wilcox Silver Plate Co. v. Green*, 72 N. Y. App. 17.

**3015.** One who buys property with full knowledge that the title to the same is in dispute, is not an innocent purchaser, and hence he acquires no greater rights than his vendors had. *Joseph V. Ledoux, Adm'r v. John C. Burton, Mrs. Ledoux, Intervenor*, 30 La. 576.

**3016.** If an animal has at the time of sale patent defects apparent upon casual inspection or any defect known to the buyer, such defect would not usually be covered by a general warranty. *Hurton v. Plato*, 3 Colo. 402.

**3017.** Even when it is shown that the expressed consideration of a transfer does not exist, the contract cannot on that account be invalidated, if the transferee proves that there was another legal, and sufficient consideration. *Brown, Adm'r v. Brown*, 30 La. 966.

**3018.** Where a party, knowing the pecuniary condition of a debtor, purchased a claim against him of an ascertained amount, an

opinion, however erroneous, expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment. *Conn., et al. v. Penn.*, 5 Wheaton, 424, U. S.

**3019.** Seller, on discovering that the buyer is insolvent, may stop the goods while in transit before the buyer acquires possession, even when the goods are attached by another creditor, if the purchase price remains unpaid. *Walsh v. Blakely*, 6 Mont. 194; see *Calahan, et al. v. Babcock, et al.*, 21 Ohio St. 292.

**3020.** When everything the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. (Citing: *Williams v. Allen*, 10 Hump. 337); *Bush v. Barfield*, 41 Tenn. 92.

**3021.** If by a contract goods are to be paid for at each delivery, the refusal to pay for any delivery, without sufficient cause, authorizes a rescission of the contract on the part of the vendor. *Rugg v. Moore*, 110 Penn. 236.

**3022.** Where goods, sold to be paid for in cash or notes on delivery, are delivered to the purchaser without the cash or notes being given or demanded, the presumption is that the condition has been waived, and that a complete title vests in the purchaser. *Parker v. Baxter*, 86 N. Y. 586.

**3023.** This presumption, however, may be rebutted by such declaration or acts of the parties, connected with the circumstances, as show an intention that the delivery should not be considered complete until performance of the condition. *Parker v. Baxter*, 86 N. Y. 586.

## SATISFACTION OR RELEASE.

**3024.** After the satisfaction of a judgment in favor of plaintiff it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided. *Hatch v. Centl. Nat. Bank*, 78 N. Y. 487.

**3025.** A release, even sealed, cannot be set up in equity to defeat those who were not parties to it, and who had separate interests. *Oelrich v. Spain*, 15 Wall. U. S. 211.

**3026.** Satisfaction by one joint tortfeasor is a bar to an action against another, so a partial satisfaction by one is proper to be shown by another in mitigation of damages. *Knapp v. Roche*, 94 N. Y. 329.

## SAVINGS BANK.

**3027.** A depositor in a savings bank, one of whose by-laws contained in his deposit book, provides that, "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not



given notice of his book being stolen or lost, if such book be paid in whole or part, on presentation," cannot maintain an action against the bank for an amount which, in good faith and without notice that the book had been stolen, it paid to a person who, fraudulently personating the depositor, presented the book and obtained the amount. *Goldrick v. Bristol County Savings Bank*, 123 Mass. 320.

**3028.** The object and effect of the act of 1875 (chap. 371 Laws of 1875), in relation to savings banks, was to prescribe a sole and complete rule for their existence, and the exercise of their powers. It applies to corporations then existing, and whatever right of action existed against their trustees for penalties or forfeitures under former statutes was terminated by it. *Van Dyck v. McQuade*, 86 N. Y. 38.

**3029.** Under the general act regulating the dealings and operations of savings banks (§ 27, chap. 371, Laws of 1875), the fact that a savings bank secures an agreement to pay interest from the bank with which it makes a deposit authorized by said act, does not convert the deposit into an unauthorized loan. *Erie Co. Savgs. Bank v. Coit*, 104 N. Y. 532.

**3030.** The provision of said act (§ 33), declaring the trustees of savings banks who vote for the declaring and crediting of any interest or dividend in excess of the interest or profits earned, personally liable to the corporation for the amount of the excess, does not limit the interest, which may lawfully be voted for, to net profits. If the trustee votes for a dividend less than the whole amount of interest or profits earned, without any deduction therefrom for expenses, although the earnings have not been actually received, he does not, in the absence of fraud or bad faith, overstep his statutory duty, and is not liable to the penalty. *Van Dyck v. McQuade*, 86 N. Y. 38.

**3031.** Whenever a dividend is declared and credited to a depositor it becomes his property, to which he is entitled in preference to the creditors of the corporation. *Van Dyck v. McQuade*, 86 N. Y. 38.

**3032.** It seems that a trustee, in an action against him to recover the penalty, cannot avoid liability because the manner of voting, and of recording the vote prescribed by the statute was not followed; he can waive the direction, as it was made for his benefit, but cannot take advantage of the omission. *Van Dyck v. McQuade*, 86 N. Y. 38.

**3033.** The Y. Savings Bank, of which defendant was a trustee, in pursuance of the requirements of its charter (§ 6, chap. 338, Laws of 1869), at the opening of its bank, posted notices of the rate of interest to be paid by it upon deposits; and thereafter paid interest at the rate stated up to January, 1877. In an action brought by plaintiff, who was appointed receiver of said bank, in July, 1877, to recover the interest so paid, the referee found that the interest received from investments of the funds of depositors exceeded the interest paid them, but that its expenses exceeded its earnings and income. No fraud or other misconduct, or want of ordinary care and skill was imputed to defendant. *Held*, that defendant was not liable; that the order of payment of the debts of the bank, and what portion of its profits the trustees might from time to time divide, related to its general business, which was left to the judgment of the trustees (§§ 4, 7), and as long as it was exercised in good faith in the due course of management, no common-law liability was incurred; nor was there any injury to the corpora-

tion, so that in the light of the common law there was no rule by which damages could be assessed; that no liability was imposed under the chapter of the revised charter in reference to moneyed corporations (1 R. S., chap. 18), to which by said charter the bank was made subject "so far as applicable," as the prohibition in said chapter against paying dividends to stockholders save from "surplus profits" has no application, the interest payable to depositors of savings banks not being dividends within the meaning of the statute, and as said statute prescribes the remedy for its violation; that if said chapter of the Revised Statutes ever had any force as applicable to savings banks it became inoperative after the passage of the said act of 1875: also, that no liability attached under the provision of the act last mentioned (§ 33), declaring the trustees of a savings bank, who vote for a dividend in excess of the interest or profits earned, liable to the corporation for the amount of the excess, as the interest paid was not in excess of that earned. *Van Dyck v. McQuade*, 86 N. Y. 38.

**3034.** Assessments were made and paid into the bank by the trustees, under a resolution adopted by the board to the effect that such assessments should be considered as loans on interest "not to be returned to the payer until the expiration of one year, unless otherwise ordered by the board and the profits of the bank warrant it." *Held*, that under the resolution the money advanced became payable absolutely at the end of the year, and before that time at the option of the bank, in case the profits warranted it; but that, as so far as it appeared from the pleadings and evidence the fund advanced was joint, and as there was no statement of an individual advance or loan by the defendant, he could not apply the general fund in discharge of any individual liability on his part. *Van Dyck v. McQuade*, 86 N. Y. 38.

**3035.** Defendant T. was one of the trustees of a savings bank; to make up a deficiency in the assets of the bank, caused by a loss upon a loan made by it, he executed a mortgage to H., who assigned it to the bank. In an action to foreclose the mortgage, *held*, that T. in executing it did not thereby become a surety or obligor for moneys loaned by the bank, within the meaning of the provisions of the act of 1875, in relation to savings banks (§ 21, chap. 371, Laws of 1875), which prohibits a trustee from becoming such surety or obligor; and so, that the mortgage was not invalid as violative of that provision. *Best v. Thiel*, 79 N. Y. 15.

**3036.** The claim was made that the trustees of the bank were personally liable for the deficiency. The superintendent of the banking department informed them that they were so liable, and that this liability would be enforced unless they made up the deficiency; and upon his requirement the mortgage was executed. T. set up want of consideration as a defence. *Held*, untenable. 1st. The seal was presumptive evidence of a consideration, which presumption was not clearly overcome. 2d. T. was estopped from denying the legal validity of the mortgage as it was with his knowledge and assent reported to the bank department and represented to the depositors of the bank as a portion of its assets, and upon the strength thereof and other similar securities, the bank was permitted to continue its business. *Best v. Thiel*, 79 N. Y. 15.



**3037.** Commercial paper discounted by, void; but action may be maintained to recover the money loaned. See *Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, 79 N. Y. 449.

**3038.** The bank itself and the receiver, as such, are proper and necessary parties defendant to such an action. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

**3039.** The M. & T. S. Institution, a savings bank, chartered under the Act, Chapter 368, Laws of 1852, by resolution of its board of directors, authorized C., its president, to sell one thousand seven hundred and fifty shares of stock held by it as security for a loan to J. & Co. "for the best interest of the bank \* \* \* and in such form as to protect the bank in its claim against" J. & Co. C. made sales of all but eight hundred shares, which shares were reported to the board and entered in its minutes. Thereafter C. authorized plaintiff, who was a member of the New York Stock Exchange, to sell five hundred shares of the stock at the said Exchange, which was the recognized market for stock in said city, at twenty-five per cent., and to offer it daily until sold, with privilege to the seller to deliver it any time in sixty days. Plaintiff, pursuant to this authority, sold at the price limited, and immediately notified C., who, however, before this had sold the eight hundred shares at private sale without notifying plaintiff or revoking his authority, and C. declined to furnish the stock to meet plaintiff's contract. The stock was thereupon bought in under the rule of the said Stock Exchange, and plaintiff paid the difference between the price paid and what he received. In an action to recover the sum so paid, *held*, that the employment of plaintiff to sell, and the contract of sale, was within the authority conferred upon C. by the resolution; that plaintiff's employment was an employment by defendant; the sale was within its corporate powers; and the subsequent sale, by which it was disabled from furnishing the stock to meet the sale made by plaintiff was no defence to the action; also that, in the absence of evidence, the presumption was that C. complied with the resolution, and before employing plaintiff to sell had by agreement with J. & Co., or otherwise, protected the bank against any claim on their part. *Sistare v. Best*, 88 N. Y. 527.

**3040.** Defendant by its charter (§ 2) is prohibited from loaning money on "notes, bills of exchange, drafts, or any personal security." It was claimed that the loan to J. & Co., on security of the stock was in violation of the charter, and so that the agreement with plaintiff was void. *Held* untenable; that the pledge of the stock was at most voidable, not void, and plaintiff in accepting the employment was not bound to inquire as to defendant's title. *Sistare v. Best*, 88 N. Y. 527.

**3041.** The relation between a savings bank and its trustees or directors is that of principal and agent, and that between the trustees and depositors is similar to that of trustee and *cestui que trust*. *Hun v. Cary*, 82 N. Y. 65.

**3042.** If such trustees transcend the limits placed upon their power in the charter of the bank and cause damage to the bank or its depositors, they are liable. *Hun v. Cary*, 82 N. Y. 65.

**3043.** They are also bound to exercise care and prudence in the execution of their trust, in the same degree that men of common pru-

dence ordinarily exercise in their own affairs. *Hun v. Cary*, 82 N. Y. 65.

**3044.** Where loss is occasioned by the failure of a trustee to exercise ordinary care and judgment, he cannot excuse himself by claiming that he did not possess them; by voluntarily taking the position, he undertakes that he does possess and will exercise them, and it is immaterial that the services are rendered gratuitously. *Hun v. Cary*, 82 N. Y. 65.

**3045.** Defendants were trustees of the C. P. Savings Bank, which was incorporated in 1867; up to January, 1873, its average deposits were about \$70,000, and its expenses had exceeded its income. In May of that year, by action of the board of trustees, the bank purchased a lot at a cost of \$29,250, \$70,000 of the purchase money being paid in cash; the bank covenanting to erect a building thereon to cost not less than \$25,000. Upon the lot the bank erected a building for a banking house, at a cost of about \$27,000, and gave a mortgage thereon for \$30,500. The object of the purchase and building was to improve the financial condition of the bank by increasing its deposits. The bank failed in 1875. The lot and buildings, and other property which produced less than \$1,000, constituted all of its assets; the real estate was swept away by foreclosure of the mortgage. At the time of the purchase the bank occupied leased rooms; its assets were insufficient by several thousand dollars to pay its debts, which fact was known to the trustees. By the charter of the bank (chap. 294, Laws of 1868), it had power to purchase a lot for a banking house, requisite for the transaction of its business. In an action brought by the receiver of the bank against the trustees, for damages caused by alleged improper investment of its funds, *held*, that the facts justified a finding that the case was not one of mere error or mistake of judgment on the part of the trustees, but of improvidence and reckless extravagance; and that they were properly held liable. *Hun v. Cary*, 82 N. Y. 65.

**3046.** Also, *held*, that as the only relief asked was a money judgment, the action was properly tried as an action at law by a jury. *Hun v. Cary*, 82 N. Y. 65. Also, *held*, that plaintiff was not required to join all the trustees as defendants. *Hun v. Cary*, 82 N. Y. 65.

**3047.** Two of the defendants, after the commencement of the action, filed petitions for their discharge in bankruptcy and were discharged before judgment. *Held*, that such a discharge was not a defence to the action, as the claim, being for unliquidated damages occasioned by a tort, was not provable in bankruptcy and therefore not discharged. *Hun v. Cary*, 82 N. Y. 65.

**3048.** S. deposited with defendant, a savings bank, a certain sum of money, receiving a pass book, which stated that the account was with her, "in trust for Christopher Boone," plaintiff's intestate. S. received the pass book and drew out one year's interest. After her death defendant paid the amount to her administrator, upon production of his letters of administration and of the pass book. In an action to recover the deposit, *held*, that, in the absence of any notice from the beneficiary, the payment was good and effectual to discharge the defendant; that the deposit constituted S. trustee and transferred the title to the fund from her individually to her as such trustee; that,



upon the death of S., her rights as trustee to demand and receive the fund devolved upon her administrator, and upon his demand defendant was bound to pay it over; it had no right to inquire into the nature of the trust, and owed no duty to the beneficiary until the latter by notice, by forbidding payment or by demanding it himself, created such right and duty. *Boone v. Citizens' Savgs. Bank*, 84 N. Y. 83.

### SET-OFF.

**3049.** H., being indebted to W. on a note under seal for \$109, took from a third party an assignment of a note of W. for \$58.33, with the knowledge of W., and with the understanding between the parties that it would be credited against the note for \$109. *Held*, that the equity to such credit attached to the note for \$109, and followed it into the hands of an assignee, though without notice. *Hall v. Hickman*, 2 Del. 318; also, *Oliver*, use of *Griffith v. Lowry*, 2 Haring, Del. 467.

**3050.** Under the Gen. Statute, c. 130, § 3, a demand for money paid cannot be set off unless it is a sum that is liquidated, or one that may be ascertained by calculation. *Taft v. Larkin*, 123 Mass. 598.

**3051.** Debts are not mutual when one is by the defendants as principal and surety, to the plaintiff as trustee for a minor, and the other is by plaintiff as an individual to the defendants as partners. *Vason, et al. v. Reall, Trustee*, 58 Ga. 500.

**3052.** The assignee of a mortgage, unless the mortgagor has estopped himself, holds it subject to all the equities to which it was liable in the hands of the assignor. The mortgagor having given a certificate that he has no defence, is estopped from setting up a defence against an assignee.

**3053.** Any subsequent assignee may avail himself of a certificate of "no defence," given to the first, if he shows that he or a prior one under whom he claims, was an assignee for value without notice.

**3054.** Burns, through an agent of a trust company, borrowed from them on a note and assigned stocks, etc., as collateral; the agent borrowed from Ashton, and afterwards took an assignment of Burn's note and collaterals. *Held*, that Ashton took the collaterals subject to the equities between Burns and the company. *Ashton's Appeal*, 73 Penn. 153.

**3055.** Whenever a demand is for damages, which the law is capable of measuring accurately by a pecuniary standard, it is a proper subject of set-off under our statutes. *Sledge v. Swift, Murphy & Co.*, 53 Ala. 110.

**3056.** The right of set-off in an action is governed by the law of the place where the action is brought. In an action brought in Ohio by the indorser against the maker of a promissory note, payable to order, executed in Kentucky, and indorsed before due, the maker cannot set off a debt due to him from the payee, notwithstanding the Kentucky statute, which declares such notes, "assignable so as to vest the right of action in the assignee," but provides that such assignment shall not

"impair the right to any . . . offset the defendant has or might have used" against the payee. *Second Nat. Bank of Cincinnati v. Hemingray*, 31 Ohio, 168.

**3057.** A set-off may be pleaded in an action brought by a receiver of an insolvent national bank. Where usurious interest is reserved or charged on a note or bill discounted by a national bank, the entire interest reserved or charged will, in an action on the note or bill, be adjudged forfeited. *Hade v. McVay, Allison & Co.*, 31 Ohio, 231.

**3058.** A voluntary assignee allowed certain bank deposits to remain in the name of the assignor, and without bringing suit for them, after the maturity of notes held by the bank on which the assignor was liable as indorser: *Held*, that the bank could retain the deposits in set-off against the notes, as by Gen. Stat. R. I. cap. 202, § 14, the right of set-off is determined by the state of the claims at "the time of the commencement of the action." *Nightingale v. Chafee*, 11 R. I. 609.

**3059.** A legacy, presently payable, cannot be set-off in equity against a debt of the legatee to the estate, not yet due. *Hayes, Adm'r v. Hayes*, 2 Del. 191.

**3060.** In a suit against a party and his sureties, a debt or demand due from the plaintiff to the principal defendant may be set-off. *Himrod, et al. v. Baugh*, 85 Ill. 435.

**3061.** A demand against one person cannot be set-off against him and his nominal partner in a suit by them on a note made to the firm. A set-off must be against all the partners. *Jones v. Howard*, 53 Miss. 707.

**3062.** Where a surviving partner purchases from the administrator of his deceased partner the interest of the latter in the partnership property, as assets of the estate, he cannot, in a suit to collect the purchase money, set off a debt due him from such decedent in his lifetime, even if such set-off grew out of a settlement of partnership matters. *Welborn v. Coon*, 57 Ind. 270.

**3063.** Where an executor or administrator has sold, on credit, property of the estate, he may bring an action in his own name to recover the debt, and in such an action a debt against the decedent may not be made the subject of a counterclaim. *Thompson v. Whitmarsh*, 100 N. Y. 35.

**3064.** A stockholder indebted to an insolvent corporation for unpaid shares cannot set-off against this trust fund for creditors a debt due him by the corporation, the fund arising from such unpaid shares must be equally divided among all the creditors. *Sawyer v. Hoag*, 17 Wall. U. S. 610.

**3065.** A cause of action founded upon an implied contract may be the subject of a set-off. *Fanson v. Linsley*, 20 Kan. 235.

**3066.** A plea of set-off setting up a promise good in parol, by the common law, need not show a compliance with the requisites of the statute of frauds. The statute prescribes a rule of evidence, and not a rule of pleading. *Lehow v. Simonton, et al.*, 3 Colo. 346.

**3067.** A surviving partner, in an action against himself to recover a debt which he individually incurred, can set off a claim of the firm against the plaintiff. The set-off must have been a subsisting



right in the defendant at the time the action was commenced. *Johnson v. Kaiser*, 40 N. J. 286.

**3068.** Where, therefore, in an action by a receiver, upon a demand due the bank, the defendant sought to set off certain checks drawn in his favor by depositors, which the referee found were not delivered to the bank, and credited to defendant's account, until after the service of an injunction order issued in the proceedings for the appointment of the receiver, restraining the officers of the bank from further action or interference with its assets. *Held*, that the retention of the checks by the receiver was not a ratification of the act of the bank officers in receiving them, and that the set-off was properly disallowed. *Van Dyck v. McQuade*, 85 N. Y. 616.

**3069.** Any set-off to a promissory note which would have been good between the original parties, may be pleaded against an indorsee who acquires it after maturity. He takes it subject to any right of set-off which the maker had against any prior holder. *Davis v. Neligh*, 7 Neb. 78.

**3070.** Set-off to the maker of a promissory note, who was principal, arising after maturity of the note, does not discharge the other maker who was surety. *Strong v. Foster*, LXXXIV. 201; 17 C. B. 201 (Eng. Com. Law).

**3071.** When a promissory note, pleaded as a set-off, shows on its face that it was given for a consideration different from the plaintiff's claim, it carries with it no presumption of a settlement of such claim. *Ross v. Boswell*, 60 Ind. 235.

**3072.** A claim arising from a bonus paid on a usurious loan, is the subject of a set-off, and will be barred, if not presented as a set-off, in a suit that offers an opportunity. *Dey v. Jackson*, 39 N. J. Law, 535.

**3073.** In an action arising upon contract, any other cause of action arising also upon contract, and existing at the time of the commencement of the action, is a good counterclaim. *Foulks v. Rhodes*, 12 Nevada, 225.

**3074.** A note given by A. to B., and not yet due, cannot, in equity, be set off against a note given by B. to A., upon which A. has brought an action for the benefit of C., to whom he assigned it, although C. knew at the time of the assignment that A. was insolvent, and A. was subsequently declared a bankrupt. *Spaulding v. Backus*, 122 Mass. 553.

**3075.** A third party, for whose benefit a simple contract has been entered into for a valuable consideration, moving from the promisee, and upon which the third party might maintain an action against the promisor, such third party may, when sued in assumpsit by the promisor, plead by way of set-off the damages arising from the non-performance of the contract made for his benefit, and if he omits to aver in his plea to whom the promise was made, it will be taken to have been made to the party from whom the consideration proceeded. *Lehow v. Simonton, et al.*, 3 Colo. 346.

**3076.** In the exercise of its equitable jurisdiction this court has power to order one judgment to be set off against another, where the judgment prayed to be set off may be enforced against the person recovering the judgment to be satisfied by the set-off. The doctrine is a purely equitable one, and will be administered in all cases upon such

equitable terms as will promote substantial justice. *Brown ads. Hendrickson*, 39 N. J. Law, 239.

**3077.** A counterclaim set up by the defendants in an action can only be maintained when it exists in favor of all the defendants against the plaintiffs, and each and every one of them. Where a note is on its face joint or joint and several, it is conceived that evidence to show that one maker is surety for the other is inadmissible at law if the question arises between the creditor and the surety; but evidence to that effect has been received where the question arises between the principal debtor and the sureties. As between the makers of a promissory note and the holders, all are alike liable, all are principals; but as between themselves, their rights depend upon other questions. *Great West Ins. Co. v. Pierce*, 1 Wyoming S. Ct. Rps. 45.

**3078.** W. purchased of A. a claim against B., pending an action by A. upon the claim. B. had previously purchased a claim against A., and had given notice thereof to A. Suit was brought thereon by B. in the name of the assignor, in which W. appeared as adverse claimant of funds in the hands of B. summoned as trustee. At the time of his purchase of the first claim W. had no knowledge of the claim against A. against judgment for the plaintiff in the first action. B. purchased this claim after action had been brought by A. against him, so that it could not have been used in set-off in that action, the statute only permitting demands not negotiable to be so used when a party has become the equitable owner thereof and given notice to the plaintiff before the commencement of his action. Gen. St. c. 130, § 5. At the time W. made his purchase he had no knowledge that there was any such claim against A. as that of F. and another. *Ames v. Bates*, 119 Mass. 397.

**3079.** In an action against the maker, on a promissory note made payable to bearer, the defendant answered, alleging that he had executed the note in suit to A., in consideration of the assignment to him, by A., of several promissory notes executed to the latter by B. for the purchase money of certain real estate conveyed by A. to B. by warranty deed; and that B. had been evicted from the possession of part of such land by a purchaser of the same at a sale thereof on decree, to satisfy a mortgage thereon existing at the time of such conveyance; that which eviction was a breach of A.'s warranty, and by reason thereof B. had defeated the collection of a portion of such notes for purchase money, held by the defendant, prior to any notice to him that the note in suit had been transferred by A. to the plaintiff. *Held*, that an instruction to the jury, stating to them that the consideration of the note in suit was different from that alleged, and testified to, by the defendant is erroneous. *Held*, also, that the allegation of an eviction may be established by showing that the grantee was either turned out of possession by, or was placed in such a situation that to avoid expulsion, he yielded up possession to, or purchased of, a stranger having a paramount title. *Held*, also, that if the defendant had received from B., on such notes for purchase money, an amount equal to the sum paid therefor by him to A. with interest thereon, the plaintiff should recover; but that, there being no evidence on the point, an ambiguous instruction in relation thereto was erroneous. *Black v. Duncan*, 60 Ind. 522.



**3080.** Also *held*, that no right of set-off arose under the Federal Bankrupt Act. *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

**3081.** There is no right of action upon a certificate of deposit in ordinary form issued by a bank until demand of payment. *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

**3082.** A receiver of an insolvent bank has no power to allow a set-off against a debt owing to the bank, where the demand sought to be set off was assigned to the debtor for that purpose after his appointment; and what the receiver cannot thus do directly, cannot be done by way of ratification or waiver. *Van Dyck v. McQuade*, 85 N. Y. 616.

**3083.** Planter, whether before or after his crop is planted, obtains from a banker an advance of money with which to make it, contracting by parol to deliver at warehouse part of cotton crop of equal value, no price or definite quantity being specified, and dies before any cotton is delivered, sale is incomplete and his title to whole crop remains undiverted. *Lewis v. Laftey, et al., Adm'rs*, 60 Ga. 559.

**3084.** Note for fertilizers contained stipulation that unless written notice was given on July 1st, failure of consideration should not be pleaded; plaintiff setting up such failure, without alleging written notice stipulated for, properly stricken. *Pritchard v. Johnson & Calhoun*, 60 Ga. 288.

**3085.** Upon an agreement for the sale of goods, and payment therefor with a satisfactory promissory note, the buyer selected the merchandise, had it weighed, marked with his initials, and placed by itself in the store of the vendor, to be removed upon payment for it, or giving an acceptable note for the amount. The buyer did not comply with these terms, and the vendor refused to allow the buyer to take the goods away until he was paid. Several months thereafter the goods were destroyed by fire. *Held*, that there was no such delivery of the goods as to constitute the vendor a bailee for the purchaser. *Safford v. McDonough*, 120 Mass.

**3086.** If the vendee in a contract of sale refuses to receive the article sold, the vendor may sell it at private sale; and on proving that he thus sold it at its full market price, he may recover from the vendee the difference between that price and the price stipulated in the contract of sale. *Succession of Dongart*, 30 La. 264.

**3087.** A. executed to B. a deed of his property in trust (amongst other things), to convert the same into money. B., under the assumed authority of this deed, mortgaged the property. *Held*, that the mortgage was not authorized by the trust for sale, and was only valid to the extent of B.'s beneficial interest (if any) in the premises. *The Edinburgh Life Ins. Co. v. Allen*, 18 Grant's Chancery, Ontario, 425.

**3088.** A defendant cannot resist payment of a demand for the price of goods sold and delivered to him, on the ground that the sale was in fraud of the creditors of the seller. Under our statute of frauds, only preëxisting creditors have the right to object to a sale for that reason. As to them, such sale is voidable at their election, but, as to all others, is valid and obligatory. *Gary, Hudson & Co. v. Jacobson*, 55 Miss. 204.

**3089.** A warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a ware-

houseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order, to be indorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller. *Held*, by the Court of Appeal (Spragge, C. and Morrison and Gwynne JJ. dissenting), that the purchaser had an insurable interest. *Box v. The Provincial Ins. Co.*, 18 Grant, Ontario, Chancy. 280.

**3090.** Stipulation that fertilizer is sold under the inspection and analysis of Dr. Means, Inspector at Savannah, and the Department of Agriculture at Atlanta, does not preclude the maker from setting up warranty of equality, and urging failure of consideration, etc. *Austin & Ellis, Agents v. Cox, et al.*, 60 Ga. 520.

**3091.** Goods were consigned to A. for sale, who made advances upon them to the consignor, and afterwards sold them to B. under a warranty that they were of a certain quality. The goods did not correspond with the warranty, and B. gave notice thereof to the consignor, and, with his consent, rescinded the sale, but gave no notice to A. *Held*, that A. could not maintain an action against B. for the price of the goods. *Robinson v. Talbot*, 121 Mass. 513.

**3092.** Except in a case when there is an express agreement in derogation of the general rule, the sale of goods, produce, or merchandise by weight, tale, or measure, is not perfect, and the goods are not at the risk of the buyer, until they have been weighed, counted, or measured. The purchaser of goods who has paid their price, knowing them to be damaged when he paid for them, is not thereby estopped from suing for a diminution of price, and damages, when it appears that there was an understanding between him and the seller, at the moment of payment, that his right of reclamation were reserved. A vendor who is ignorant of the vices of the things sold, is liable only for the difference, at the time and place of sale, between the actual value of the thing sold and what it would have been worth if sound, and the expenses connected with the sale. *William S. Peterkin v. George Martin*, 30 La. 894.

**3093.** The Court has no authority, on the application of the sheriff, made after the return day of the execution, to set aside a sale of personal property regularly and fairly made. A sale is a contract to pass rights of property for money, which the buyers pay, or promise to pay, to the seller for the thing bought and sold; and if the sheriff gives possession of the property sold, before obtaining the full payment therefor, and the bid was settled by the purchaser in good faith, which is not denied, the right of property passes. When the sheriff, on his own authority, distributes money levied under several executions before the return day of the writ, he does it at his own risk. His misapplication of the proceeds cannot destroy the validity of a sale otherwise good. *Mackanness v. Long*, 85 Penn. St. 158.

**3094.** By the terms of a sale of goods the buyer was to send for the goods and take them away. This case was before the Court at a previous stage, 118 Mass. 143. The only additional fact proved at the second trial was, that after the defendant was told that the skins were lying in the doorway, they were pointed out to him, and he passed out of the door where they were lying, and said he would send for them. That there was sufficient evidence of delivery has been conceded



throughout this controversy; the question being whether, on the facts reported, there was evidence of acceptance within the statute of frauds. It is enough to say that the additional fact does not necessarily show an acceptance, and the presiding judge could not properly have ruled as requested by the plaintiff; and, having found for the defendant, he must necessarily have found that there was "not such an equivocal act of acceptance as would take the case out of the statute." As it was part of the contract that the defendant should send for the skins, the fact that he said he would do so, when he left the store, does not add to the effect of the evidence. *Knight v. Mann*, 120 Mass. 219.

### SIGNATURE.

**3095.** *Held*, that the genuineness of the signature to or indorsement of a note ceases to be presumed the moment the defendant denies it in his pleas supported by affidavit, and the plaintiff must make proof of the same; and that in the present case the plaintiffs were guilty of neglect in accepting the note without sufficient caution. *Dorwin, et al. v. Thompson*, 3 C. L. J. 130, S. C. 1867, Canada.

**3096.** If a defendant by exception admits his signature to a note of hand, and plead a term for payment, it is not necessary for the plaintiff to prove the signature, even though the exception be dismissed and there is a *defence en fait*. *Vallieres v. Roy*, 2 Rev. de Leg. 335, K. B. 1820; 1223 C. C. & 145 C. C. P. Ca.

**3097.** A dealer with a bank trusting to his clerk's report that his bank book was correct, omitted to examine it, and did not discover that checks, forged in his name by the clerk, had been paid by the bank, charged in the book, and cancelled, and returned with it, until some months after their payment: *Held*, that he was not estopped from denying the genuineness of the checks. *Weisser v. Denison*, 10 N. Y. Ct. of App., 1854 (6 Seld.) 68.

**3098.** Standards of comparison, to be used by experts upon the trial of an issue as to the genuineness of a signature when not a paper already in the case or admitted to be genuine, are not admissible for that purpose, unless they are clearly proved by witnesses who testify directly to their having been written by the party whose signature is in question.

**3099.** Where a receipt was offered as such standard of comparison, and a witness testified that the defendant gave him a receipt that looked very similar to the one offered, but that he could not positively say it was the identical one offered in evidence: *Held*, that the evidence was too uncertain to warrant the admission of the paper as a standard of comparison. *Pavey v. Pavey*, 30 Ohio, 600.

**3100.** In an action by the indorsees of a promissory note against the alleged makers, in which the defendants by their plea denied their signature, *Held*, confirming courts below, on evidence that one of the firm by whom the note purported to be signed had therein admitted that the signature was that of the firm, and had been written by himself, that as there was no clear and legal proof of want of genuineness

in the signature the admission could not be set aside on mere presumption arising from knowledge of the maker's handwriting, and also that another promissory note signed by the firm could not be sued for the purpose of creating a standard of comparison of handwriting, such signature not having been itself established to be genuine. *Reid, et al. v. Wanner*, 17 L. C. R. 485, Q. B. 1867, Canada.

**3101.** Where the signature to a bill or note is denied, experts may be appointed on motion of one of the parties, and their report promulgated as conclusive. *Lord v. Laurin, et al.*, 9 L. C. J. 171, and 15 L. C. R. 452, C. C. 1865, 322 *et seq.* C. C. P. Canada.

**3102.** In a power of attorney the party executing it described herself as executrix and sole legatee under the will of M.; she signed it simply in her own name. *Held*, that the description was sufficient to show that it was executed by her as executrix, and the failure to add her official character to the signature did not impair its effect. *Myers v. Mut. L. Ins. Co.*, 99 N. Y. 1.

#### STATED ACCOUNT.

**3103.** Stated accounts were given in an answer in equity, and the benefit thereof claimed as if pleaded. They were supported by sufficient evidence. *Held*, the burden of proof was on the party impugning the accuracy of the accounts. *Seamans v. Burt*, 11 R. I. 320.

**3104.** What constitutes, is a matter of evidence. Setting down a plea of, for argument, is equivalent to a demurrer. *Allen v. Woonsocket Co.*, 11 R. I. 288.

**3105.** The fact that a balance is shown in an account and claimed in a suit, does not make it less an open account. The term "open account" is used in contradistinction to a stated account, wherein the account is closed by an assent to its correctness by the party charged. *Whittlesey v. Spofford*, 47 Texas, 13.

#### STATUTE OF LIMITATIONS.

**3106.** A promise by M. that "he would see his brother and would pay the debt," sufficient to remove the bar of the statute of limitations. A promise relied on to avoid the statute of limitations, made to an attorney, is in law a promise made to the principal, and can be declared on as such. *Kirby v. Mills*, 78 N. C. 124.

**3107.** Residence and not citizenship is contemplated in the statute prescribing limitations upon the time of bringing actions, and the statute runs in favor of a debtor who has his domicile in the State. The statute ceases to run when the debtor becomes a non-resident, but revives upon his demise. *Savage v. Scott, et al.*, 45 Iowa, 130.

**3108.** Part payment of the consideration of a parol promise not to be performed within the year, does not withdraw the agreement from the operation of the statute. *Reinheimer v. Carter*, 31 Ohio, 579.



**3109.** The statute of limitations in force where the remedy is sought, and not that existing where the contract was made, must govern the remedy. *Sampson v. Sampson*, 63 Me. 329.

**3110.** Statute of limitations runs against an infant having only color of title to the land. *Soule v. Barlow*, 49 Rowell, Vt. 329.

**3111.** Statute of limitations can apply to future transactions only, unless they are expressly given effect on previous transactions, or unless some of their terms cannot be met otherwise. *Perrin v. Kellogg*, 36 Mich. 316.

**3112.** A credit upon an account after the cause of action on the same is barred by the statute of limitations, will not be treated as part payment thereof, unless shown to have been so intended by the parties. *Kaufman v. Broughton*, 31 Ohio, 424.

**3113.** Where the statute of limitations has begun to run during the life of the devisor, no disability in the devisee will arrest it. *Bozeman, et al. v. Browning, et al.*, 31 Ark. 364.

**3114.** Under the Gen. Sts. c. 155, § 14, a payment of interest on a promissory note by the principal does not take the debt out of the statute of limitations as against a surety. *Faulkner v. Bailey*, 123 Mass. 588.

**3115.** Part payment upon a bond made by the administrator of one of the joint makers within the statutory period will prevent the running of the statute of limitations in favor of the remainder. *The County of Vernon to use of School Fund v. Stewart*, 64 Mo. 408.

**3116.** Statute of limitations begins to run on an administrator's bond from the expiration of four and a half years after issuing letters of administration. *Biddle v. Wendell*, 37 Mich. 452.

**3117.** Plaintiff, in order to remove the bar of the statute of limitations, having shown that defendants were non-residents of the State wherein the cause of action accrued, it was held, that the burden was on defendants to show that they had owned attachable property within the State. *Rixford v. Miller, et al.*, 49 Rowell, Vt. 319.

**3118.** If money is loaned, to be repaid on demand, and no note or obligation is given in writing to repay it, the statute of limitations commences running from the time of the loan. When the statute of limitations holds, the debt cannot be revived, except by a promise in writing signed by the debtor. *Estate of Galvin*, 51 Cal. 215.

**3119.** A payment by one of several makers of a joint and several promissory note, were in fact partners when they signed the note, will take it out of the statute of limitations as to the others, if the note be a partnership debt, and the payment made out of partnership funds. *Mix v. Shattuck, et al.*, 50 Vt. 421.

**3120.** Payments made by the treasurer of a partnership from partnership funds, and by him indorsed on a partnership note, take the note out of the statute of limitations, in the absence of any showing that he acted without authority and without duty. *Walker v. Wait, et al.*, 50 Vt. 668.

**3121.** A partial payment of a debt, replied to the statute of limitations, raises only a *prima facie* presumption that such payment is an admission of continued indebtedness. *Strong v. The State, ex rel, etc.*, 57 Ind. 428.

**3122.** In an action on account for money loaned, where the six

years' statute of limitation is pleaded, a reply that such money is part of a mutual running account, remaining unsettled, and extending up to the time of bringing the action, is sufficient on demurrer. *Harper v. Harper*, 57 Ind. 547.

**3123.** Since the passage of the Married Woman's Act of 1861, the statute of limitations runs against a married woman the same as against a *feme sole*. The expression in *Morrison v. Norman*, 47 Ill. 477, and *Noble v. McFarland*, 51 Ill. 226, to the effect that the Married Woman's Act of 1861 has no effect upon the saving clause in the limitation laws, is overruled. *Cortner, et al. v. Walrod*, 83 Ill. 171.

**3124.** The payment by the principal, year by year, of the interest on a joint and several promissory note, will prevent the statute of limitations from attaching to the note in favor of the surety. The rule on this subject, laid down in *Ellicott v. Nicols*, 7 Gill, 86, has been the accepted law of this State for nearly thirty years, and in the absence of legislation to the contrary, it is not to be questioned. *Schindel v. Gates*, 46 Md. 604.

**3125.** An acknowledgment of a debt, made not to the creditor, but to a stranger, does not avoid the running of the statute of limitations. *Schmucker v. Sibert*, 18 Kansas, 104.

**3126.** The presumption that a bond has been paid which arises after a lapse of twenty years, has not been changed or abolished by the passage of the act of limitation to suits on bonds. Such presumption is not a legal bar; it is a presumption of fact which must be held to be conclusive, unless rebutted by evidence showing satisfactorily that the bond has not been paid, or furnish good and sufficient reasons why longer forbearance has been given. *Hale, et al. v. Park's ex'r*, 10 West Va. 145.

**3127.** A promise by a member of a late partnership, made after dissolution and before a suit is barred by the statute of limitations, to pay a partnership debt, will not prevent the running of the statute so as to estop the other partner from availing himself of the defence of the statute as against the original cause of action; and this whether the creditor was aware of the dissolution or not. *Tate v. Clements*, 16 Florida, 339.

**3128.** In order to obtain the benefit of the statute of limitations, a defendant must insist on it as a bar to his answer. If, instead of so doing, he simply denies the allegations of the petition, he cannot, upon the trial, also insist upon the bar of the statute. *Townsley v. Moore*, 30 Ohio, 184.

**3129.** A debt was due October 6th, 1862; suit was brought October 6th, 1868. Held, not barred by the statute. When suit is brought within six years after the day on which the cause of action arose, that day is to be excluded from the computation. *Menges v. Foick*, 73 Penn. St. 137.

**3130.** The receipt for nine hundred dollars, borrowed, to be returned "when called for," created a cause of action from its date, and against it the statute ran from the time of its execution. The mere removal of a debtor, without communicating to his creditor the place of his new domicile, does not constitute such a fraud as will stop the running of the statute. *Eborn v. Zimpelman*, 47 Texas, 503.

**3131.** The act of 1868, ch. 357, provides, that "In actions here-



after brought, where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring the suit shall be deemed to have first accrued at the time at which such fraud shall, or with usual and ordinary diligence might have been known and discovered." *Held*, 1st. That it was not thereby meant that in all cases a party must commit a fraud *distinct* from, and *independent* of the original fraud, for the purpose of keeping the injured party in ignorance of his cause of action, nor that the mere concealment of the fraud is insufficient. 2d. That where one practices fraud to the injury of another, the *subsequent concealment* of it from the injured party is *in itself a fraud*, and if he is thereby kept in ignorance of his cause of action, he is kept in ignorance by "the fraud of the adverse party." *Wear v. Skinner*, 46 Md. 257.

**3132.** To remove the bar of the statute of limitation, plaintiff introduced a letter from defendant, in which defendant "in regard to settlement, that he was ready any day after that week, and willing to leave it out to be settled, but that he thought it would be better to settle it themselves, if they could," and that he did not see where plaintiff got his statement of what had been put upon the farm; and asked when plaintiff would "look the business over." *Held*, that the letter was an admission of the existence of an unsettled account, and an expression of willingness to settle it, unaccompanied by an expression of unwillingness to pay the balance that might be found due, and that it took plaintiff's claim out of the statute. *Bliss v. Allard*, 49 Rowell, Vt. 350.

**3133.** The lapse of time provided by a statute of limitations as to real actions, vests a perfect title in the holder. *Bicknell v. Comstock*, 113 U. S. 149.

**3134.** Reduction from 20 to 15 years applies to causes of action accruing after passage of the act. 1 Bush. 145. As to non-residents. *Selden v. Preston*, Bush.

**3135.** Not suspended by death. *Wenman v. Ins. Co.*, 13 Wend. 263; *Quincy v. Hall*, 19 Cal. 77; *Christophers v. Garr*, 2 Selden, 62.

**3136.** Acknowledgment of debt, barred by statute of limitation renews the debt. *Lawson v. McCartney*, XVII. Reporter, 694; *Bell v. Morrison*, 1 Peters, 351.

**3137.** One partner cannot deprive the firm of the bar of the statute of limitations after a dissolution of the partnership. *Bell v. Morrison*, 1 Peters, 351.

**3138.** The insolvency of a bank having occurred prior to June 1, 1865, an action against a stockholder, under the individual liability clause of its charter, not commenced Jan. 1, 1870, is barred by the statute of limitations of the State of Georgia, of March 16, 1869. *Terry v. Tubman*, 92 U. S. 156.

**3139.** The Exchange Bank of Columbia, S. C., failed in February, 1865. In June, 1872, its creditors filed a bill in equity to enforce their claims against the stockholders under a clause of the charter, which, "upon the failure of the bank" rendered them individually liable for any sum not exceeding double the value of their respective shares. The defence set up the Statute of Limitations of 1712, which requires actions upon the case, and actions of debt, grounded upon a contract, without specialty, to be brought within four years. *Held*, that as the

liability of the stockholders arose from their acceptance of the act creating the corporation, and their implied promise to fulfil its requirements, the proper remedy was an action upon the case; and that, as the statute barred such an action at law, it was also a good defence in equity. *Carrol, et al. v. Green, et al.*, 92 U. S. 509.

**3140.** Barring suits for the recovery of real estate after a certain lapse of time, does not apply to the case of a suit brought by a vendor of land having a vendor's lien, and who has never made a deed but only agreed to make one against a purchaser from the original vendee. Both the original vendee and the purchaser from the original vendee. Both the original vendee and the purchaser from him, stands in the relation of a trustee to the vendor for the unpaid purchase money (or, as the matter is looked upon in some States, stands in that of a mortgagee), against whom the statute does not run. *Lewis v. Hawkins*, 23 Wall. U. S. 120.

**3141.** The parties to a contract may provide by express stipulation for a shorter limitation to actions thereon than that fixed by the general law. *Wilkinson v. Nat. F. Ins. Co.*, 72 N. Y. App. 499.

**3142.** Letters written by a partner recognizing the existence of a judgment against the firm, after it is barred by the statute of limitations, will not revive the judgment against him, when he was not originally liable by reason of the dissolution of the firm before the judgment was rendered. *Harford, Thayer & Co. v. Street*, 46 Iowa, 594.

**3143.** Where the party against whom a cause of action exists, by fraud or actual fraudulent concealment prevents the party in whose favor it exists from obtaining knowledge of it, the statute only commences to run from the time the right of action is discovered, or might by the use of diligence have been discovered. *Findley, et al. v. Stewart, et al.*, 46 Iowa, 655.

**3144.** Fraud which must have been discovered if reasonable diligence had been exercised, not a good reply to the statute of limitation. *Sutton v. Dye*, 60 Ga. 449. A motion to set aside a judgment is barred after the lapse of seven years from its rendition. *Cauthorn v. Harkness*, 60 Ga. 299.

**3145.** The following writing, addressed to the plaintiffs and signed by the defendant, was offered as evidence of an acknowledgment of the debt sued on, to take the case out of the operation of the statute of limitations: "It will suit my convenience to execute my note for the balance due for rent, payable January 1, 1877." The court rejected it. *Held*, that the court below properly rejected the writing, as it is too vague and indefinite to prove such acknowledgment. *Trustees, etc. v. Gilmer*, 55 Miss. 148.

**3146.** If, at the time when a right of action accrues, there is no one in being to assert it, the statute of limitations will not commence to run until there is some one who has power to sue. *Metcalf v. Grover*, 55 Miss. 145.

**3147.** Where a demand is necessary to found an action upon, the demand is barred unless made within the period of the statute of limitations, and the right of action is extinguished by the delay. *Palmer v. Palmer*, 36 Mich. 487.

**3148.** Upon all demand paper not excepted by Statute Comp. L.



1871, (§ 7151), from the provisions of the statute of limitations, the time runs from the beginning, without any special demand, and no one can become a *bona fide* purchaser who does not take it within some reasonably short period; to hold otherwise would enable banks to issue certificates of deposit, of any denomination, for circulation as ordinary bank bills, and with like effect. *Tripp v. Curtenius*, 36 Mich. 494.

**3149.** It is questioned whether an administrator of the estate of a deceased person can by any acknowledgment, in writing or otherwise, suspend the running of the statute of limitations against the debt of his intestate. Nor can an administrator, by making payments on a demand of over \$50, suspend the running of the statute of limitations against such demand. *Clawson v. McCune's Adm'r*, 20 Kansas, 337.

**3150.** An indorsement, in the handwriting of the debtor, but not signed by him, of a payment of part of a promissory note, will not prevent the operation of the statute of limitations, if no money or valuable consideration actually passes between the parties, even if the parties, at the time of the indorsement, orally agree that it shall be deemed to be a payment. *Blanchard v. Blanchard*, 122 Mass. 558.

**3151.** The failure of an administrator to sue on, or collect, a note due his intestate until it has become barred by the statute of limitations, does not affect the infant distributees of the estate, but they may bring suit on such note, within the time limited by the statute after they become of legal age. *Pittman v. McClellan*, 55 Miss. 299.

**3152.** Action for recovery of one-half of money expended in purchasing material to build house in joint occupancy of two persons, should be brought as soon as money is expended, and if not brought within four years thereafter, is barred. *Guill v. Guill*, 60 Ga. 446.

**3153.** A statute of limitations of the *loci contractus* cannot be pleaded in bar in a foreign jurisdiction, where both parties were resident in the *loci contractus* during the whole statutory time, so as to make the bar complete there, unless such statute go to the extinction of the right itself, and not to the remedy only. The rule of the common law is that the limitation of actions depends on the law of the forum, and not on the law of the State or county where the contract was made. A statutory bar of one State cannot be pleaded in another, where the bar only affects the remedy of the contract sued on. If the right of action on a contract has been extinguished by a statute of limitations in another State, where the parties reside, the courts of this State will give effect to that statute in any suit brought in this State on such contract. *Perkins v. Guy*, 55 Miss. 153.

**3154.** Mistake of fact induced by attorney of opposite party, in matter easy of verification, no ground to vacate agreement based thereon, on bill filed eight years thereafter. *DeGere v. Healy & Berry*, 60 Ga. 391.

**3155.** Bank bills that ceased to circulate as currency prior to June 1st, 1865, came under the limitation act of 1869. That the bank surrendered its charter in 1877, and its assets were then put by a court of equity in the hands of a receiver, did not disengage the bills from the operation of said act. In distributing the assets between creditors and stockholders, the stockholders can insist on excluding the creditors as to all the demands against the corporation which were barred by the

statute of limitations prior to the surrender of the charter. *Johnston, et al. v. Talley, et al.*, 60 Ga. 540.

**3156.** Generally limitation laws act only upon remedies, and do not extinguish rights. A surety, therefore, is not absolutely discharged because a suit against him would if brought be barred in the courts of this State by section 2917 of the Code. Were he to subject himself to action in a jurisdiction, and be there sued, the limitation laws of the Code would not avail him, though they had fully run in his favor during his previous residence here. Where principal and surety are both residents of Georgia at the execution of the contract, and the principal afterwards removes to another State, the statute of limitations is suspended as to him until his return. (Code, § 2929.) If, before the remedy was barred as to the principal, but after it was barred as to the surety, the latter made a new promise in writing at the instance of the creditor, the new promise is binding, though he made it in ignorance of the true limitation law, believing the remedy not barred as to himself, and though the creditor, in like ignorance and under the same belief, told him it was not barred, and thus influence his action, there being no fraud or abuse of confidence. *Langston, Adm'r v. Aderhold*, 60 Ga. 376.

**3157.** When two separate sums are received by one bond, a payment in respect of one sum does not prevent the statute running in respect of the other. *Ashlin v. Lee*, 31 L. T. N. S. 721; 23 W. R. 287; 44 L. J. Chaney. 174; V. C. H. (affirmed on appeal), 32 L. T. N. S. 348; 23 W. R. 458; 44 L. J. Ch. 376 (Eng.)

**3158.** Statutes of limitation will not bar suit on coupons, unless the time be sufficient to bar suit on bond also. *City of Lexington v. Butler*, 14 Wall. U. S. 282.

**3159.** Statute of limitations has no application to an express trust where there is no disclaimer. *Seymore v. Freer*, 8 Wall. U. S. 202.

**3160.** When an instrument payable at a bank is lodged with the bank for collection, the bank becomes the agent of the payee to receive payment. *Ward v. Smith*, 7 Wall. U. S. 447.

**3161.** When not lodged with the bank, whatever the bank receives from the maker to apply upon the instrument, it receives as his agent. *Ibid.*

**3162.** The provision of the Code of Procedure (Old Code, § 99, sub. 2), declaring that an action shall be deemed commenced, within the meaning of the statute of limitations, when the summons is delivered to the sheriff or other officer with intent that it shall actually be served, applied only to defendants who were parties to the action at the time of such delivery, or who were made parties before the statute had run against the claim upon which the action was brought. *Shaw v. Cock*, 78 N. Y. 194.

**3163.** Such delivery of the summons did not prevent the running of the statute in favor of persons who, although liable upon the obligation sued upon, were not named as defendants in the summons; and it is immaterial whether the omission was by design or through ignorance, mistake or inadvertence. *Shaw v. Cock*, 78 N. Y. 194.

**3164.** So, also, where by order amending the summons a new party defendant was brought in, the suit was only commenced as to him



when thus brought in; and if between the time of the commencement of the action as to the original parties, and the time when the new defendant was brought in, the period of limitation had expired, a plea of the statute in bar of his liability is good. *Shaw v. Cock*, 78 N. Y. 194.

**3165.** Under the provisions of the Code of Procedure (§ 92, sub. 2) limiting the time for bringing an action to recover a penalty to three years, where an action is brought against a trustee of a manufacturing corporation, to charge him with debt because of failure of the corporation to file an annual report, more than three years after January twentieth of the year when the alleged failure occurred, the action is barred; as upon that day, if at all, the cause of action accrued. *Knox v. Baldwin*, 80 N. Y. 610.

**3166.** An action against a stockholder to enforce the liability imposed where all the capital stock has not been paid in, is barred by the statute of limitations after the expiration of six years from the time the liability was incurred. *Knox v. Baldwin*, 80 N. Y. 610.

**3167.** A foreign corporation sued in this State cannot avail itself of the statute of limitations; and this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this State, and has property and officers therein. *Boardman v. L. S. & M. S. R. R. Co.*, 84 N. Y. 157.

**3168.** An acknowledgment of a debt by the personal representative of the original debtor, deceased, will not take case out of statute. *Thompson v. Peters*, 12 Wheat. U. S. 565.

**3169.** The lapse of six years is not a bar to an action to recover a deposit; the statute of limitations only begins to run from the time payment is refused. *Thomson v. Bank British N. Am.*, 82 N. Y. 1.

**3170.** Where the drawer of a check has no funds at the time in the bank to meet it, the check is due immediately without presentment and demand, and the statute of limitations begins to run from its date. *Brush v. Barrett*, 82 N. Y. 400.

**3171.** Where, therefore, the holder of the check delays for six years to enforce his claim it is barred by the statute. *Brush v. Barrett*, 82 N. Y. 400.

## STATUTES.

**3172.** The practical construction put upon a statute by public officers whose duty it is to obey it is not controlling upon the courts. *In re Manhat. Sav'gs Inst'n*, 82 N. Y. 142.

## STOCK AND STOCKHOLDERS.

**3173.** As between a corporation and corporator, the stock book is evidence of their relation; the certificate is secondary evidence. Assignment of a certificate is only an equitable transfer, and must be produced to the corporation and a transfer made. *Bank of Commerce's Appeal*, 73 Penn. St. 59.

**3174.** Stock was pledged as collateral for a note ; the pledgee took a mortgage as further security ; the stock at the time was of greater value than the amount of the mortgage ; the pledgee had not the stock during the pledge, so as to re-deliver on redemption. The mortgage was to be credited with the value of stock when executed. *Ashton's Appeal*, 73 Penn. 143.

**3175.** An agreement for a valuable consideration by A. to purchase from or sell to B., at the option of the latter, a certain number of shares of stock within a limited time at a specified price, is not *per se* a gaming contract. An illegal intent will not be presumed ; and in the absence of proof that the parties were merely speculating upon the fluctuations in the price of the stock, without any intent that A. should deliver or accept, but simply should pay differences, the contract is valid and may be enforced. *Story v. Solomon*, 71 N. Y. 420.

**3176.** It is competent for a party to show any facts and circumstances surrounding the making of a contract, which would enable the jury to determine the subject-matter to which the contract was in fact applicable. It is an elementary rule of construction that every written instrument should be interpreted in the light of the circumstances surrounding its execution, and it is error for the court to exclude evidence of the circumstances under which the instrument was executed. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to non-suit. *Bickett v. Taylor*, 55 Howard, N. Y. 126.

**3177.** If any one stockholder is required to pay debt due by the corporation, he is entitled to contribution from all the other stockholders whose subscriptions are unpaid. If any stockholder who has not paid up his subscription claims to be a creditor of the corporation, his unpaid stock is liable for the debt, and he cannot recover from another stockholder the full extent of his claim. By the act of 1872, ch. 325, § 59, all the stockholders of a corporation are severally and individually liable to the creditors of the corporation of which they are stockholders, to an amount equally to any unpaid subscription held by them respectively. *Weber v. Fickey*, 47 Md. 196.

**3178.** A person is presumed to be the owner of stock when his name appears on the books of a company as a stockholder ; and, when he is sued as such, the burden of disproving that presumption is cast upon him. *Turnbull v. Payson*, 95 U. S. 418.

**3179.** A party who made a contract with an organization which had attempted irregularly to create itself into a corporation, and which acted as such, or who subscribed to its capital stock, cannot, in a suit by the corporation, defend himself against a claim growing out of such contract or subscription, by alleging the irregularity of such organization. *Chubb v. Upton*, 95 U. S. 665.

**3180.** A subscriber to the capital stock of a railroad corporation, who has failed to pay for the shares subscribed for, as required by the terms of his subscription, is properly chargeable with interest from the time of the default, and cannot compel the company to issue the stock until not only the principal but the interest is paid. *Gould v. Town of Oneonta*, 26 Sickles (71 N. Y.) 268.

**3181.** Under articles of association which had been adopted as part of the charter of the bank it was provided that so long as a stock-



holder might remain indebted to the bank, his stock should not be transferable. *Held*, that the defendant was not liable in damages for refusing to permit the indorser, while still remaining liable on his indorsement, to transfer his stock on the books of the bank. *McDowell Bank of N. & B.*, 2 Del. 1.

3182. The Michigan Statute (Comp. L. § 2852) does not make individual stockholders primarily liable for corporation debts. The liability of a stockholder for a corporation is discharged by the creditors extending the time and accepting the note of the corporation. *Hanson v. Donkersley*, 37 Mich. 184.

3183. An action brought by a stockholder of a bank on behalf of himself and other stockholders against its directors, to call them to account for losses and damages sustained by the bank because of misconduct and negligence on their part in the discharge of their duties, is an equitable action, wherein the defendants are not entitled, as matter of right, to a trial of the whole issues by jury. *Brinkerhoff v. Bostwick*, 105 N. Y. 567.

3184. It seems it is proper in such an action to frame issues to be tried by a jury. *Ibid*.

3185. Certain shares in a company incorporated by letters patent, issued under 27 and 28 Vict. ch. 23, were allotted, by a resolution passed at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount, deducted from their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the appellant for value as fully paid up shares, and he accepted them in good faith as such, and a year afterwards became a director in the company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share book the amount mentioned was "Shares, two, at \$300=\$600." *Held*, reversing the judgment of the Court of Appeal for Ontario, that a person purchasing in good faith, without notice, from an original shareholder, under 22 and 28 Vict., ch. 23, as shares fully paid up, is not liable to an execution-creditor of the company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares. (The Chief Justice and Ritchie, J., dissenting.) *McCraken v. McIntyre*, 1 Canada, S. C. 479.

3186. Where a manufacturing corporation gave its note for goods purchased, which was indorsed, discounted and renewed from time to time, the last note taken up by the vendor, action brought thereon and judgment obtained against the corporation, that the indebtedness arose on the purchase and became due on the maturity of the first note within the meaning of the provisions of the general manufacturing act (§ 24, chap. 40, Laws of 1848), declaring that no stockholder shall be personally liable for a debt of such a corporation unless a suit for the collection thereof shall be brought against it within one year after the debt became due; and that, as the action against the corporation was not brought within a year after the maturity of the first note, a stockholder was not personally liable for the debt, because of failure to file a certificate of the paying in of the capital stock of the corporation, as required by said act. (§ 10.) *Jagger Iron Co. v. Walker*, 76 N. Y. 522.

**3187.** It seems that the bank which discounted any one of the notes could have held it as a new liability, and could have enforced it irrespective of the original indebtedness. *Jagger Iron Co. v. Walker*, 76 N. Y. 522.

### SUBROGATION.

**3188.** It seems to be a settled rule of equity that if A. owes B. and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt. But a private arrangement as to liability of securities, as between themselves, comes neither within the rule nor the principle upon which it rests.

**3189.** The complaint alleged that the plaintiffs, who are bankers, issued letters of credit to the Atlantic De Laine Co. Hoyt, Sprague & Co. guaranteed to plaintiffs that the De Laine Co. would keep its contract, and in default thereof H., S. & Co. would hold plaintiffs harmless of loss. E. H., who was a partner of the firm of H., S. & Co., guaranteed to his said firm the payment of any and all sums of money which should remain due and owing to said H., S. & Co., after all the property of the Atlantic De Laine Co. should have been applied to the payment of the debts of said Co., the intention of said guaranty being to secure to H., S. & Co. the payment in full of any ascertained balance of account due them by said Atlantic De Laine Co., and in case of his death his personal representatives were to pay such ascertained balance, for which he would be liable under the above guaranty, without delay, out of his assets in their hands applicable to the payment of his debts. The plaintiffs ask as relief that the balance of account due to H., S. & Co. from the Atlantic De Laine Co. may be ascertained and determined, and that the plaintiffs may be adjudged to be subrogated to all rights of said H., S. & Co. to collect the said balance so to be ascertained from the executors of E. H., and that said executors be directed to pay the assets in their hands applicable to the payment of the debts of said E. H. to the plaintiffs, to the extent necessary to satisfy their claims and demands. On demurrer to the complaint by the executors of E. H. *Held*, that the action would not lie. E. H. was, in no just sense, a principal. The only principal was the Atlantic De Laine Co. H., S. & Co. were sureties. *Held*, further, that H.'s guaranty was to secure an ascertained balance, and it is only when all the property of the De Laine Co. shall have been applied in payment of its debts that, within the terms of the guaranty, the balance becomes ascertained. *Morgan, et al. v. Francklyn*, 55 Howard, Pr. N. Y. 244.

**3190.** A surety who pays the debt of his principal is subrogated to all the remedies of the creditors as against the principal, or others who become liable for the debt. *Talbot, et al. v. Wilkins, et al.*, 31 Ark. 411



## SUNDAY CONTRACTS AND SALES.

**3191.** A written contract made on Sunday, but bearing the date of another day of the week, may be transferred, and will be enforced in the hands of a transferee in good faith and without notice. *Johns v. Bailey, et al.*, 45 Iowa, 241.

**3192.** A contract by a livery stable keeper to hire a horse on Sunday, for purposes of business or pleasure, is void; otherwise, if it is for purposes of charity or necessity, etc. *Stewart v. Davis*, 31 Ark. 518.

**3193.** A promissory note or agreement in writing, dated on Sunday, in payment of a horse purchased on the same day, is null and void, under 45 Geo. 3. L. C. R. 221, S. C. 1859. A promissory note, payable to order, may be validly made on the Lord's day, commonly called Sunday. *Kearney v. Kinch, et al.*, 7 L. C. J., 31 S. C. 1862.

**3194.** The defendant sold a horse to the plaintiff on Sunday; the plaintiff gave his bank check for the price of the horse on the same day; the defendant at the same time deposited a bill of sale of the horse with a third person, to be delivered to the plaintiff when the check was paid; the check was paid, and the horse and bill of sale were delivered, all on a secular day afterwards. *Held*, that an action of assumpsit to recover back the price paid for the horse on account of a deceit practiced in the sale would not lie, because based upon a transaction tainted with illegality. *Plaisted v. Palmer*, 63 Me. 576.

## SURETIES AND SURETY.

**3195.** Sureties, not having paid the debt for which they are bound, are not creditors of their principal. The surety's liability for his principal is not a valuable consideration, as against creditors of the principal, for a bond conditioned for the payment of a sum of money as a debt. *Jefferson v. Tunnell, et al.*, 2 Del. 135.

**3196.** A., B. and C. were co-sureties; C. died, and A. and B. were forced to pay the debt after the administration on the estate of C. had been settled, and more than two years after the grant of letters. *Held*, that they could subject assets descended to the heir to contribution. *Williams, et al. v. Ewing & Fanning*, 31 Ark. 229.

**3197.** The sureties on a joint and several bond, given by them with A. and B. as principals, to dissolve the plaintiff's attachment of "the goods and estate of the said A. and B.," the condition of which is that A. and B. shall pay to the plaintiff "the amount, if any, which he shall recover in such action," are not discharged by the discontinuance of the action as to A. *Poole v. Dyer*, 123 Mass. 363.

**3198.** 1st. To entitle a surety to an assignment and execution against his co-sureties under section 7 of art. 9 of the Code, vol. 1, it is incumbent upon him not only to satisfy the judgment, but to pay the whole amount of it. *Wilson, et al., Adm'rs v. Ridgely, et al.*, 46 Md. 235.

**3199.** 2d. Whilst it is an undoubted proposition that the liability of the surety is not to be extended by implication beyond the terms of his written contract, by which his responsibility is to be measured, the

bond constituting such contract must have such construction given to it as to carry out the intention of the parties thereto, and in this respect there is no difference between such contract and any other. *Engler v. People's Fire Ins. Co.*, 46 Md. 322.

**3200.** Where all the stockholders of a corporation give their joint and several note, for money loaned to it, they are co-sureties as between themselves, in proportion to the relative amounts of stock owned by them respectively. *Coburn v. Wheelock*, 34 N. Y. 440; S. C., 42 Barb. 267.

**3201.** A surety paying a judgment against his principal and himself will be substituted to the lien of the judgment upon land in the hands of a *bona fide* purchaser. See Judgments, No. 3, and *Edison v. Huff, et al.*, 29 Va. 338.

**3202.** A bond on which the principal and surety are both bound, one paid by the surety in the lifetime of the principal, without assignment by the creditor, or agreement to assign, is forever dead as a security, as well in equity as at law. There can be no subrogation in such a case. *Cromer v. Cromer's Adm'rs*, 29 Va. 280.

**3203.** A surety's payment of what as to the creditor is his own debt becomes a purchase as against the principal debtor. *Fairchild v. Lynch*, 99 N. Y. 359.

**3204.** A banker's lien upon all securities deposited with him by a customer, and received by him *bona fide*, is not affected by any equities which may exist between that customer and a third party. *Misa v. Currie*, 35 L. T. N. S. 414; 24 W. R. 1049; 35 L. J. Exch. 414; 1 L. R., App. Cas. 554—H. L.

**3205.** An indorser of an accommodation bill has a right to notice of dishonor, unless it is shown that he would, if he paid the bill, have no remedy over against any other party to the bill. *Turner v. Samson*, 35 L. T. N. S. 537—C. A. Eng.

**3206.** Estate of a surety bound jointly but not severally with his principal, discharged in law on his death, the other obligor surviving; and in equity also in the absence of equitable circumstance making him liable. *Pickersgill v. Lahens*, 15 Wall. U. S. 141.

**3207.** One who has delivered draft as collateral security has no right subsequently to forbid or to attack any conditions to its payment. *Johnston v. Allen*, 22 Fla. 224.

**3208.** If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and, after that, he gives time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety applies. *Overend, Gurney & Co. v. Oriental Financial Corporation*, 7 L. R. H. L. Cas., 348, (Eng.)

**3209.** Merely giving an additional security by a principal will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so. *Ibid.*

**3210.** *Semble*, that to reserve a creditor's rights against a surety there must be a distinct expression of intention to reserve it. *Ibid.*

**3211.** A check is not an assignment by the drawer to the payee of a debt or a chose in action within the meaning of the Judicature Act, 1873, § 25, Subs. 6. *Schroeder v. Central Bank of London*, 34 L. T. N. S. 735; 24 W. R. 710, C. P. Div. Therefore the payee of a check



has no right of action for its dishonor against the banker on whom it is drawn. *Ibid.*

**3212.** Where one person becomes surety for the payment of money by another, who is himself a surety for a third person, they are not co-sureties; and on payment of the principal obligation by the first surety, the secondary one is discharged. *Remington v. Staats*, 1 S. C. 394.

**3213.** Where a party, when asked to sign a note, as surety, refuses unless another person will first execute the same, and the principal maker forges the name of such other person, and thereby induces the party to sign, and procures money of an innocent party who has no notice of the fraud, the fact of the forgery and the fraud will not release the surety so executing the same. The case of *Seely v. The People, etc.*, 27 Ill. 173, is departed from so far as it conflicts with the rule as above laid down. *Stoner v. Millikin, et al.*, 85 Ill. 218.

**3214.** A verbal notice by a surety on a promissory note to the holder thereof, to proceed at once to collect the note of the principal, and a verbal agreement by said holder so to do, do not waive the notice in writing required by the statute, and a failure to proceed according to the verbal agreement will not operate to release the surety. *Chrisman v. Tuttle*, 59 Ind. 155.

**3215.** An extension of the time of payment of a promissory note, upon the consideration that the maker will annually pay interest on the note at the rate stipulated therein, will not release the surety. *Ibid.*

**3216.** A surety cannot be held under a judgment void as to his principal. *McCloskey, Bigley & Co. v. Wingfield & Bridges*, 29 La. 141.

**3217.** The surety of an administratrix who fails to perform her duties as prescribed by law, has a right to be released from his bond. *Sanders v. Adeline Edwards*, 29 La. 696.

**3218.** A mortgage was given to secure the payment of notes; their time of payment was extended by the holders, there being no evidence of a consideration for such extension. *Held*, that this did not discharge the surety. *Zane v. Kennedy*, 73 Penn. St. 182.

**3219.** An agreement without consideration to give time to a debtor is not binding on the creditor, and would not prevent the surety from paying the debt and seeking reimbursement from the principal. *Ibid.*

**3220.** A surety, who holds several securities by way of indemnity, may resort to either of them for payment. *Muller v. Dows*, 94 U. S. 444.

**3221.** Married woman can contract no liability as surety for her husband, nor make a mere personal obligation not connected with, nor charging property, nor bind herself by mere personal promise jointly with her husband, or as his surety. A husband cannot sue his wife at law or in equity to enforce a purely executory contract. *Jenne v. Marble*, 37 Mich. 319; *Kitchell v. Mudgett, et al.*, 37 Mich. 81.

**3222.** Part payment of a debt already due is not a sufficient consideration for an agreement to extend the time for the payment of the residue. *Turnbull v. Brock*, 31 Ohio, 649.

**3223.** The liability of a surety is always *strictissimi juris*, and may not be extended by construction beyond his specified engagement. *Nat. Mech. Bank Ass'n v. Conkling*, 90 N. Y. 116.

**3224.** A surety who takes of the debtor a mortgage for his indemnity as such surety, is to be regarded in equity<sup>a</sup> as a *bona fide* purchaser within this rule, and will be protected to the extent of his liability as surety. Such mortgage executed to one or more of several sureties on the official bond of an officer, inures to the benefit of all the sureties, as well to those who subsequently become such under an order of court requiring "additional sureties" in pursuance of law, as to those who were sureties at the date of the mortgage. *Bank v. Teeters*, 31 Ohio, 36.

**3225.** A *bona fide* purchaser of a debtor's land from a fraudulent vendee, without notice of fraud, or of the rights of the creditor, acquires an equity superior to that of a creditor, who obtained a judgment against the debtor, and levied his execution on the land, after the date of the fraudulent sale, and prior to that of the *bona fide* purchaser. *Second National Bank v. Teeters*, 31 (De Witt) Ohio, 36.

**3226.** An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract. *Harner v. Dipple*, 31 Ohio, 72.

**3227.** Surety or indorser of a bankrupt is released from liability by the bankrupt's payment of the debt to the creditor who accepts payment in fraud of bankruptcy law, without the consent of the surety or indorser, although the assignee of the bankrupt may recover the amount so paid of the creditor. The judgment in favor of the assignee against the creditor establishes conclusively that the payment was accepted, with implied notice of the bankrupt's insolvency and of his intention to defraud the Bankrupt Act. *Northern Bank of Ky. v. Cooke*, 13 Bush, Ky. 340.

**3228.** A security taken by one of several co-sureties, to indemnify him against the joint liability, inures to the benefit of all. *Elwood v. Deifendorf*, 5 Barb. 398.

**3229.** Where one of two co-sureties pays the debt of their principal, and obtains an assignment of a mortgage held by the creditor as collateral security, which he subsequently forecloses, and himself becomes the purchaser of the mortgaged premises for a nominal sum, his co-surety is only entitled to have the fair cash value of the premises, on the day of sale, credited on the original debt; he has no interest in the lands. A commission of five per cent. and the expenses of foreclosure, are proper items of deduction from the value of the mortgaged premises. *Livingston v. Van Rensselaer*, 6 Wend. 63.

**3230.** If the surety does not assent to an alteration of the terms of his undertaking, it ceases, when materially altered, to be his contract, and has thenceforward no more force as to him than if the whole writing had been a forgery, unless it has previously become effectual by delivery, and the alterations be made by a stranger. *Blakey v. Johron*, 13 Bush, Ky. 197.

**3231.** A surety after judgment continues for most, if not for all purposes, a mere surety, and is entitled to demand the same good faith on the part of the plaintiff as before judgment. *Kouns v. Bank of Ky.*, 2 B. Mon. Ky. 303. Also, *Hughes's Adm'r v. Hardesty*, 13 Bush, Ky. 364.

**3232.** Surety may after maturity of debt, for the payment of



which he is responsible, replevy goods mortgaged to secure the payment of which he is responsible, to secure him as surety, and may foreclose such mortgage, although he has not actually paid such debt. *Bates v. Wiggins*, 37 Kan. 44.

**3233.** A surety, against whom judgment has been rendered, may offset, against an assignee of the judgment, whatever claims he may have purchased against the plaintiff in the judgment, in good faith, without notice of the assignment. *Townsend v. Quinan*, 47 Texas, 1.

**3234.** A surety cannot benefit by an exception personal to the principal. *Jordan & Co. v. Anderson*, 29 Ia. 749.

**3235.** The mere neglect of a privileged creditor to sue will not release the surety of the debtor, even to the extent of the value of the privilege held by the creditor, unless it be proved that in consequence of such neglect, the privilege was lost. *J. D. Hill & Co. v. Mrs. Bourcier, et al.*, 29 La. 841.

**3236.** In an action on a bond against a surety, judgment having been obtained against the principal, he is a competent witness for the surety. Although there was an expectation by a surety, by the statements of the principal when a bond was signed, that there was to be another surety, the bond was binding on the one signing although not executed by the other. The principal owed a note, which, being due, he procured a surety on another in payment of the first. The surety signed it in blank, gave it to the principal to fill up, and use it in payment of the first note. *Held*, that thereby the surety made the principal his agent to complete the note. The surety could not relieve himself from liability to the obligee who took the note *bona fide* for a valuable consideration, by showing that his instructions as to filling up the note were not followed, the surety having created confidence by putting the note in blank into the principal's hands, must suffer the loss as between himself and another innocent party. *Simpson v. Bovard*, 74 Penn. St. Repts. 351.

**3237.** A surety upon a bond will not be discharged from liability by the fact that the name of a co-surety, on the faith of which his signature has been procured, was a forgery, nor by the fact that the surety whose name was forged gave him no information of the fact, where the condition upon which the surety signed is unknown to the officer to whom the bond is given, at the time he accepts the same. *State, et al., Brown v. Baker, et al.*, 64 Mo. 167; *State, et al. v. Potter*, 63 Mo. 212.

**3238.** Judgment was rendered against one of the makers of a promissory note, who appealed to the court of common pleas, where the plaintiff again recovered. The undertaking of the surety was to pay any judgment rendered against appellant. *Held*, that the surety is liable, notwithstanding another maker of the note was made a party in the appellate court, and judgment was rendered against both makers. *Hell v. Whittier*, 31 Ohio, 475.

**3239.** An agreement between the payee and principal of a note, for the extension of the time of its payment for a fixed and definite period, in consideration of the same rate of interest as that named in the note, is valid, without the payment of the interest in advance, and, if made without the knowledge of the sureties, will discharge them. *Fawcett v. Freshwater*, 31 Ohio, 637.

**3240.** The statute providing that, where the principal maker of a joint note dies, the payee or assignee shall present the same against the estate of the decedent for allowance, and that, upon a failure to do so, the sureties shall be released, is not a mere statute of limitations. On the contrary, the statute forms a part of the contract, upon which the sureties have a right to rely, even in case of a note payable to the trustees of schools; and if the note is not presented within the time limited by the statute, the sureties will be released. *House v. Trustees of Schools*, 83 Ill. 368.

**3241.** Where, in an action on a promissory note against several apparently joint makers, one of the defendants appear, and, upon default of his co-defendants, and without any notice to them other than the original summons in the cause, alleges and obtains a judgment against them, that they are principals and he a surety only, and asks and obtains a decree that execution be first levied on their property, such judgment and order, as between the defendants, are utterly void for want of proper notice, and will not support a plea of a former adjudication of such matter. *Fletcher v. Holmes*, 25 Ind. 458. In *Pattison v. Vaughan*, 40 Ind. 253, and *Feuttriss v. The State, ex rel.*, etc., 44 Ind. 271, appear in conflict, but those decisions were announced overruled by the court in *Joyce, et al. v. Whitney, et al.*, 57 Ind. 550. Held, further, the complaint of one defendant against another, to establish the alleged suretyship of the former, is not a mere cross-complaint, but is a new and original proceeding which cannot be tried upon the summons issued by the plaintiff. *Ibid.*

**3242.** The circumstance that a security has become or is invalid and cannot be enforced, either at law or equity, does not entitle a party to come into a court of equity to have it decreed to be surrendered or extinguished without paying the amount equitably due thereon. *Tut-hill v. Morris*, 81 N. Y. 95.

**3243.** If a surety sign a bond which he is not prevented from reading by any trick or artifice of the obligee, without reading it or having it read to him, in ignorance of its contents, he cannot avoid his obligation on it because it is other than he thought it to be. *Johnston, et al. v. Patterson*, 114 Pa. 398.

**3244.** It is true there is a line of cases which decide that when an illiterate man executes a writing which has been falsely read to him, he is not bound. *Green v. North Buffalo Township*, 56 Pa. 110; *Schuylkill County v. Copley*, 67 Ind. 386.

**3245.** It is well settled that no mere indulgence by the creditor toward the principal debtor will release the surety, provided the creditor does not by any affirmative act diminish the value of any security that he may have, or tie up his own hands against the principal debtor, or release any claim he may have acquired against the property of the latter. *Clopton v. Spratt, et al.*, 52 Miss. 251.

**3246.** While indulgence and passiveness by the creditor with regard to collateral placed in his hands by the principal debtor will not release the surety, yet if, by any improper or unskilful dealing with such collateral, he impairs its value, or if he so treat it as to make it his own, the surety will be, *pro tanto*, released. *Clopton v. Spratt, et al.*, 52 Miss. 251.



**3247.** The officers and managers of a railroad or other stock company stand to its stockholders and bondholders in a very legitimate sense, in the capacity of trustees of their property, and are bound to act in their interest. *Jackson v. Ludeling*, 21 Wall. U. S. 616.

**3248.** Indulgence or non-action, though in the meantime the principal should become insolvent, unaccompanied by any act of the creditor whereby the hazard is increased, will not discharge the surety; nor the failure to issue execution, or to point out property, or, if the execution be levied on the principal's property, the failure to make up an issue with a claimant who has replevied; nor the failure to enroll a judgment on a forfeited forthcoming bond, whereby a junior judgment obtained priority. But if indulgence is granted for a definite time pursuant to an agreement supported by a valuable consideration so as to tie up the hands of the creditor, and the surety does not consent to such an agreement, he will be exonerated from liability. *Wright v. Watt, et al.*, 52 Miss. 634.

**3249.** Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or any substitute an agreement different from that which he came unto, discharges him. *Smith v. United States*, 2 Wallace, U. S. 219.

**3250.** The owner of negotiable securities which have been stolen may follow them and reclaim them, in whose hands soever they may be found: and when shown that the securities had been stolen from the owner, the burden is upon the holder to show that he took them in the usual course of business and for value. *Robinson v. Hodgson*, 73 Penn. St. 202.

**3251.** In trover for such securities, merely showing that they were in possession of another from whom defendant or his immediate bailor received them is not a defence. *Ibid.*

**3252.** A holder's possession is *prima facie* evidence of ownership, because the presumption is that it was honestly acquired. *Ibid.*

**3253.** A surety's right of action against a co-surety does not accrue until he has paid in excess of his proportionate share of liability. *Magruder v. Admire, et al.*, 4 Mo. Court of Appeals (St. Louis) 133.

**3254.** In an action for contribution by a surety against one of several co-sureties, the measure of defendant's liability is controlled by the number of his co-sureties who remain solvent. *Ibid.*

**3255.** Contribution, security on official bond who aids principal in breach, not entitled to from co-security. *Scofield v. Gaskill, et al.*, 60 Ga. 277; also, *Healey, Berry & Co. v. Scofield*, 60 Ga. 450.

**3256.** In an action upon an undertaking, the law will not increase or enlarge the terms of the undertaking to the prejudice of its signers, nor create a liability against the sureties which they did not intend to incur, and which is not within the express conditions of the bond. *Hays v. Closon*, 20 Kansas, 120.

**3257.** Judgment on replevy bond in attachment, motion to set aside by principal, because of fatal defect on face of affidavit, overruled, not bar to similar motion by surety. *Neal v. Gordon*, 60 Ga. 112.

**3258.** A surety for a tenant is not released as to rents subsequently accruing, because of a release, nor an extension of the time of payment of rent due. *Coe v. Cassidy*, 72 N. Y. App. 134.

**3259.** The promise of a surety assuring the payment of the price of a specific lot of goods to be sold to the principal debtor, is not a continuing guarantee, and hence does not cover other goods subsequently sold to the principal. *Bloom & Co. v. Kern*, 30 La. 1263.

**3260.** A valid agreement to give time on a promissory note to the principal, will discharge the surety. *Thompson v. Bowne*, 39 N. J. Law, 2.

**3261.** Discharge of the principal discharges the known surety. *Paddleford v. Thacher*, 48 Vt. 574.

**3262.** A surety or creditor has a right to have any collaterals the debtor may have pledged to either for the payment of their debt, at any point in the transaction, applied to the payment of the debt. *Price v. Tusdell*, 28 N. J. Eq. 200.

**3263.** Under the law of this State the discharge in bankruptcy of the principal on an appeal bond, will not release the surety on that bond from any obligation he incurred by signing the bond. The surety who pays the debt of his principal is subrogated, by mere operation of law, to all the rights of the creditors. No act of subrogation by the creditor in his favor is required. *Serrae Hijo v. Hoffman & Co.*, 30 La. 67.

**3264.** The general rule, that a contract void as to principal, is void also as to surety, does not apply where a person, *sui juris*, guarantees the obligation of, or becomes surety for, a married woman, minor or other person incapable of contracting. *Hicks v. Randolph, et al.*, 59 Tenn. 352 (3 Baxter).

**3265.** A surety upon a judgment by confession has the right to expect that the judgment will be entered of record within a reasonable time; and he is released from liability by an agreement between the judgment creditor and his principal that the judgment shall not be recorded, in pursuance of which it is not entered of record until after the lapse of an unreasonable time. *Hancock v. Wilson*, 46 Iowa, 352.

**3266.** Sureties in a bond given to secure performance by their principal of future mercantile engagements, and in which no period of limitation of liability is fixed, who have notified the obligees that they will no longer be bound for future transactions, are held discharged from liability for transactions thereafter entered upon, where no change in circumstances by the obligees has occurred on the faith of a longer continuance of the suretyship, and they are not prejudiced by such withdrawal. *Jendevine v. Rose*, 36 Mich. 54.

**3267.** In a suit by a bank against a late cashier and the sureties on his official bond, upon the death of the cashier insolvent, the cause will proceed against the sureties, though no administrator of the cashier may have been appointed and made a party defendant. *Farmers' and Mechanics' Bank v. Polk, et al.*, 1 Del. Chancery, 167.

**3268.** Proof of debt in bankrupt court by judgment creditor discharges lien, and indorser is discharged to extent of injury thereby received. Evidence of older liens sufficient to exhaust all of principal's property, admissible to show that no injury was thereby done to indorser, and if such be the fact, he is not discharged. Surety assenting to application of proceeds of property of principal to junior liens,



receiving part himself, not discharged. Nor is indorser discharged, who was also counsel for principal in obstructing collection of debts, by acts which grew out of litigation conducted by such counsel. *Jones v. Hawkins*, 60 Ga. 52.

**3269.** In an action by the payee against the estate of a deceased co-surety on a promissory note, the administrator set up as a defence that his decedent's co-surety, within the time necessary for service of process, after the maturity of such note, had executed an assignment for the benefit of his creditors, providing therein that the assignee should complete his trust within three years, to which assignment the plaintiff had assented. *Held*, that such assent and assignment would have been no bar to an action on such note, against such insolvent surety, within three years. *Held*, also, that such assent was not necessary to the validity of such assignment. *Held*, also, that such assent not having injured the decedent, did not release his estate. *Paul v. Logansport Nat. Bank*, 60 Ind. 199.

**3270.** A surety has the right to stand upon the *very terms* of his contract; and if such contract be altered or varied in any material point without his consent, so as to constitute a new agreement varying substantially from the original, he is no longer bound. Any subsequent addition to or deviation from the contract, is such an alteration as will discharge the surety. But if by the terms of the original contract, additions to, or alterations in the work is provided for, or left to the judgment and discretion of the other contracting party, either without limit or within certain limits, then the variation, if within the limits prescribed, is allowed by the contract itself, and the surety cannot complain of a variation which he has agreed to by the original contract. *Wehr v. German Lutheran and Ev. Congregation of Baltimore*, 47 Md. 177.

**3271.** When a judgment is rendered against principal and surety, in which the relations of principal and surety are properly certified, the surety cannot thereafter obtain an injunction to stay the levy of an execution upon his property, on the ground that prior to the judgment the creditor agreed with the principal, in consideration of the latter's withdrawing his answer, that he would not attempt to collect the judgment from the principal until he had exhausted the surety's property, nor on the ground that the creditor had delayed issuing execution on the judgment until the principal, who had personal property sufficient to satisfy the judgment, had become insolvent. *Fox v. Hudson*, 20 Kansas, 246.

**3272.** In an action between co-sureties for contribution, the defendant cannot avail himself of an indebtedness of the plaintiff to the principal as a defence. *Davis v. Toulmin*, 77 N. Y. 280.

**3273.** A parol promise to indemnify one, if he will go security for a third person, is within the statute of frauds and perjuries and cannot be enforced. *Nugent v. Wolfe*, 111 Pa. 471; *Allshouse v. Ramsay*, 6 Wheat. 331; *Shoemaker v. King*, 40 Pa. 107; *Miller v. Long*, 45 Pa. 350; *Townsend v. Long*, 77 Pa. 143.

**3274.** When negotiable notes, payable to bearer, are deposited as collateral security for a debt, the creditor is not a mere mortgagee, on lien holder, who, in case of the death of his debtor, must prove up such debt in the Probate Court. He may, after his debt is

due, collect and apply the proceeds to his debt. If such notes are uncollectible, and the creditor be driven to treat them as mere personal property pledged to secure the debt, and to invoke the aid of the courts to realize upon the security, then the matter might come within the reach of the Probate Laws, and the creditor be compelled to prove his claim, and the securities be administered under the Probate Laws. An answer resisting a suit for the possession of negotiable notes in possession of defendant, on the ground that they are held as collateral security, should show the amount of the debt secured by them. *Huyler v. Dahoney*, 48 Texas, 234.

3275. A person indebted by bond, paid a balance due upon it in notes of an insolvent bank, which was not known, at the time, to have stopped payment. *Held*, not to be a discharge in equity of the debt, but that the creditor might recover the balance due before such payment. *Jefferson, et al. v. Holland*, 1 Del. Chancery, 116.

3276. If the maker of a promissory note, as collateral security for its payment, assigns personal property to the payee, and, as additional security, third persons sign the note as sureties, the liability of the sureties becomes fixed at the time the collateral security is exhausted. *Dussol v. Bruguere*, 50 Cal. 456.

3277. The liability of sureties on a promissory note is not discharged by the Statute of Limitations until four years after their liability becomes fixed. *Ibid*.

3278. When several persons are sureties, and all but one pay the whole sum for which all became liable, those who pay may maintain a joint action for contribution against the one who failed to pay his proportion, provided they jointly paid the money. *Ibid*.

3279. If one of several sureties dies, his executor may be joined with a part of the sureties in an action against another for a contribution. *Ibid*.

3280. If one of two sureties dies, and his executor pays all the money for which both became liable, without having the claim allowed in the Probate Court, he, as executor, can recover the demand for a contribution from the other surety. *Ibid*.

3281. A settlement in the Probate Court, by the principal, is binding upon the surety, not because he is a party to the suit, but because it is an act his principal is, by law, required to perform, and is within the condition of the bond. Neither the settlement nor decree determines the fact of suretyship; or, if it once existed, that it continued. *Gravett v. Malone*, 54 Ala. 19.

3282. A confession of judgment by a principal, has on the surety only the force of a private agreement between the principal and his creditor. Even after a judgment against the principal, any agreement made with him by the creditor, without the assent of the surety, which defers payment, or in any wise impairs the recourse of the surety against the principal, will discharge the surety. *Allison v. Thomas & Rosenfeld*, 29 La. 732.

3283. When the owner of a note holds collateral security for the same, the release of such security does not discharge a surety upon the note, if such release was given at the surety's instance and with his consent. *Pence v. Gale*, 20 Minn. 257.

3284. In an action on a promissory note, payable in bank, against



a principal and surety, wherein judgment by default had been rendered against the principal, the surety thereafter answered, alleging that, though requested by the surety to levy on certain personal property belonging to the principal, the plaintiff had caused the sheriff to hold the execution without levy, and that the principal had thereafter died insolvent. *Held*, on demurrer, that, even if such answer could be made sufficient, it is insufficient for want of an averment that such property was subject to execution, and of a value sufficient to satisfy the same; it being an answer to but part, though pleaded to the whole, of the complaint. *Scott v. Shirk*, 60 Ind. 160.

**3285.** Upon principles of equity, a surety, as between himself and his principal, stands upon a different footing, in some respects, from an ordinary creditor. He is entitled to full indemnity against the consequences of the default of the principal, and is, therefore, entitled to call upon him for reimbursement not only of what he may have been obliged to pay in discharge of the obligation for which he was surety; but also of all reasonable expenses legitimately incurred in consequence of such default, or for his own protection. These do not include expenses incurred in defending himself against the just claim of the creditor, nor remote and consequential damages sustained by the surety, such as sacrifices of property for the purpose of meeting his liability, loss of time, injury to business, expenses incurred in seeking to avoid payment, etc. The cases hold that, on the debt becoming due, the surety may go into equity to compel the principal to pay, and the creditor to receive payment; and that he may also, in equity, compel the creditor to proceed against the principal debtor for the collection of his demand, upon giving security and indemnifying the creditor against delay and expenses. *Thompson v. Taylor*, 72 N. Y. App. 32.

**3286.** Facts, and not mere conclusions of law, must be stated in pleadings. Thus, in an action against a surety upon a promissory note, where forbearance to the maker is sought to be interposed; it is not sufficient to cover merely that "for good and sufficient consideration" further time was given. The consideration must be stated.

**3287.** The discharge of a surety upon a promissory note, on the ground of forbearance, may, in an action against the surety, be given in evidence under the general issue. *Winne, et al. v. Col. Sp'g Co.*, 3 Colo. 155.

**3288.** To exonerate a surety from liability upon the ground of forbearance, the extension must be for a time and upon a consideration binding upon the creditor. *Ibid.*

**3289.** Limitation laws act upon and do not extinguish rights. Hence, surety is not absolutely discharged because suit against him would be barred in Courts of this State by section 2917 of Code. Foreign jurisdiction, if sued there, limitation laws of this State would not avail him. New promises by surety, after bar as to him, but before bar as to principal, though made in ignorance of true limitation law, believing the remedy not barred as to himself, binding in absence of fraud and abuse of confidence on part of creditor. *Langston Adm'rs v. Aderhold*, 60 Ga. 376.

**3290.** N. became surety upon a note of L., and the latter executed a mortgage to secure him against loss by reason of his becoming

surety ; judgment having been obtained upon the note against both L. and N., and the other property of L. being found insufficient to satisfy the judgment, N. directed the sheriff to levy upon the property covered by his mortgage, which was accordingly sold to satisfy the judgment. *Held*, that the sale was valid and absolute and that N. could not enforce his mortgage against the property. *Exline v. Lowery, et al.*, 46 Iowa, 556.

**3291.** Certain sale notes were deposited with defendants as collateral security for the payment of a note, indorsed by the plaintiff for the accommodation of one M., and discounted by defendants for M. The collaterals were of the same value as the principal note, and were to be paid into the bank and applied on the note, so that when they were paid, the note also was to be paid and the plaintiff's liability to cease. After the principal note became due, defendants denied that they held the sale notes as collaterals and refused to give the plaintiff any information as to what had been paid on them; and the plaintiff then paid the note in full, and demanded an assignment of the collaterals, the plaintiff's payment being made by a part payment in cash and his note for the balance which he paid at maturity. *Held*, that the plaintiff could not maintain trover against defendants for the collaterals; for although, under 26 Vic. Ch. 45, § 2, he was entitled to the immediate possession of them, he had not until assignment any property in them vested in him. *Seem*, that the plaintiff's remedy would be by a special action on the case against defendants for not assigning the notes to him after demand duly made. *Held*, however, that plaintiff was entitled to recover as money had and received to his use, the amount paid to defendants on the collaterals, and that the fact of his only paying part of the principal note in cash and giving his note for the balance did not take away his right. *Seem*, also, that his right would not be affected even if the payment on the collaterals were after his payment. *Cornish v. Niagara District Bank*, 24 Upper Canada, Com. Pleas Rpts. 262.

**3292.** On a suit by the government against the sureties of a postmaster on his official bond, it is no defence that the government, through their agent, the Auditor of the Treasury of the Post Office Department had full notice of the defalcation and embezzlement of funds of the plaintiff before them, and yet neglectfully permitted the said postmaster to remain in office, whereby he was enabled to commit all the default and embezzlement, etc. *Jones, et al. v. United States*, 18 Wall. U. S. 662.

**3293.** A person in possession of land who takes a lease from another who has bought and claims the land leased, is estopped from denying the title of such other person, or showing that such person was but trustee of the land for him. *Lucas v. Brooks*, 18 Wall. U. S. 436.



## TAXATION.

**3294.** A profit upon the capital or investment of a corporation, either made or passed to the stockholders without declaration of a dividend, or a dividend declared, becomes the measure of a State tax on dividends. If a dividend be declared, the stock is taxable on the basis of the declaration, and the company is estopped by the declaration whether the dividend be earned or not. *Commonwealth v. Pittsburg, Fort Wayne & Chicago Railway Co.*, 74 Penn. St. 83.

**3295.** Solvent debts, promissory notes and mortgages are not liable to taxation. *People v. Hibernia Savings and Loan Society*, 51 Cal. 243; also, *Bank of Mendocino v. Chalfant*, 51 Cal. 369.

**3296.** The return of the city tax assessor, setting forth the amount of the taxable capital of a banking corporation, will be held as true, until the contrary has been shown by the bank.

**3297.** When a bank claims that a portion of its capital is invested in United States bonds, stocks, or currency, it must show affirmatively the exact amount of its capital so invested. Otherwise, its capital thus invested will not be exempt from taxation. The mere fact that at various periods during the year the tax is assessed, the bank "held" large amounts in United States currency, will not exempt its capital from taxation to the extent of those amounts, unless the bank proves that the currency so "held" was a part of its capital.

**3298.** While the ordinary deposits of United States currency (or national bank notes), in a bank by its customers, enter into, and form a part of its assets, they at the same time create liabilities of the bank, and thus offset themselves as assets. Such deposits, therefore, do not constitute a portion of the capital of a bank, and hence the bank cannot claim that its capital shall be exempt from taxation to the amount of such deposits. The capital of a bank which is subject to taxation, as capital, is made up of the balance of its assets remaining after deducting the debts, that portion of its assets exempt from taxation, and that portion which is taxed under another name as capital.

**3299.** United States currency and national bank notes belonging to a bank, although non-taxable, are a part of its assets, and in ascertaining the real amount of its taxable capital, such currency, and notes, must be held as compensating the debt due depositors, and thus *pro tanto*, extinguishing the liability of the bank. *City of New Orleans v. New Orleans Canal & Banking Company*, 29 La. 851.

**3300.** A tax sale made on a day other than that provided by law confers no title. *McGehee v. Martin*, 53 Miss. 519.

**3301.** A tax collector's deed, which describes the land conveyed as "200 acres in § 2, t. 12, range 1 east," is void, for uncertainty in the description. *Yandell v. Pugh*, 53 Miss. 295.

**3302.** The revenue act does not make a corporation liable for taxes assessed on its capital stock, when such capital is represented by shares of stock which are not the property of the corporation. *People v. National Gold Bank*, 51 Cal. 508.

**3303.** The relator was assessed for certain shares of the capital stock of a national bank owned by him; he served upon the assessors an affidavit to the effect that after deducting all just debts, he had no

personal property liable to taxation. He appeared before the assessors and was examined; the examination disclosed that his indebtedness exceeded the value of his taxable personal property, including the stock. A part of the indebtedness was a promissory note of \$25,000 on demand, the proceeds whereof were used by him to purchase U. S. bonds, which were pledged as collateral for the note. *Held*, that the assessors erred in rejecting the note as an item of indebtedness; that in the absence of evidence that the debt was not a just one and enforceable against the relator, he was entitled to have it deducted; and this, although the transaction was "a device to escape assessment and taxation." (1 R. S. 391, § 9, subd. 4; U. S. R. S., § 5219; chap. 596, Laws of 1880.) *People, ex rel., Thurman v. Ryan*, 88 N. Y. 142.

**3304.** A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed. *The Delaware Railroad Tax*, 18 Wall. U. S. 206.

**3305.** The fact that taxation increases the expenses attendant upon the use or possession of the thing taxed, of itself constitutes no objection to its constitutionality. *Ibid*.

**3306.** Under the Act of Congress of February 10th, 1868, and the Act of the Legislature of Pennsylvania of March 31st, 1870, shares of national banks may be valued for taxation for county, school, municipal and local purposes, at an amount above their par value. *Hepburn v. The School Directors*, 23 Wall. U. S. Reps. 481.

**3307.** The tax of ten per centum imposed by the act of July 13th, 1866, on the notes of State banks paid out after the 1st of August, 1866, is warranted by the constitution. *Veazie Bank v. Fenno*, 8 Wall. U. S. 534.

**3308.** The personal property of an insolvent bank in the hands of a receiver is exempt from State taxation. *Rosenblatt v. Johnston*, 104 U. S. 462.

**3309.** National bank shares cannot be subjected to State taxation when a very large party, relatively of other moneyed capital in the hands of individual citizens in some taxing districts is exempted. *Boyer v. Boyer*, 113 U. S. 689.

**3310.** A statute exempting a corporation confers the privilege only on the corporation especially referred to; not upon its successor, unless that intent is clear. *Morgan v. Louisiana*, 93 U. S. 217.

**3311.** Immunity from taxation is not such a franchise of a corporation as passes to a purchaser when property and franchise of a railroad are sold under a decree to enforce a statutory lien. *Railroad Co. v. Hamblen County*, 102 U. S. 273; also, *Trask v. McGuire*, 18 Wall. U. S. 391.

**3312.** The question of exemption from taxation of deposits in savings banks, as affecting the rule for the State taxation of national bank shares, was very deliberately considered by this court in *Mercantile Bank v. New York*, 121 U. S. 138; and the conclusion reached in that case was reaffirmed in *Davenport Bank v. Davenport Board of Equalization*, 123 U. S. 83; and it is impossible to distinguish this case from those cases. *Bank of Redemption v. Boston*, 125 U. S. 60.

**3313.** The laws for the taxation of national banks in Massachusetts, Mass. Pub. State C. 13 §§ 8, 9, 10, do not deny to the banks, as tax-



payers, the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States; and do not impose a disproportionate and unequal tax upon them in violation of the provisions of the constitution of that State. *Ibid.*

**3314.** The effect of the amendment of the Banking Act of 1880 (chap. 567, Laws of 1880), was to repeal the penalties imposed by the amendment of 1870 (chap. 163, Laws of 1870) upon banks taking unlawful interest. *Nash v. White's Bank*, 105 N. Y. 243.

**3315.** Accordingly held, that as said act of 1880 contains no provision saving pending actions or existing rights of action, an action brought under the act of 1870 and pending at the time of the passage of the act of 1880 was not maintainable. *Ibid.*

**3316.** It is the manifest intent of Rev. Stat. § 5219, to permit the State in which a national bank is located to tax all the shares in its capital stock without regard to ownership, subject only to the limitations prescribed in that section; and in this case the law permits the taxation of the shares in the bank of the plaintiff in error which are owned by other national banks, on the same footing with all other shares. *Ibid.*

**3317.** The purchaser of property, sold for taxes, in accordance with the provisions of law, holds, *prima facie*, after the delay for redeeming has expired, a valid title, and such title cannot be disregarded, or assailed collaterally, like a simulated title, but must be attacked in a direct action to annul. *Lannes v. Workingmen's Bank, et al.*, 29 La. 112.

**3318.** The deed of a State tax collector is not conclusive of the legality of the title conveyed by it. If such a title is properly put at issue, its validity must be proved by the party claiming under it. *State, ex rel., Louis Fix v. F. J. Herron, Recorder of Mortgages, et al.*, 29 La. 848.

**3319.** The power to sell land for the non-payment of taxes is a naked power, not coupled with an interest, and in all such cases every prerequisite to the exercise of the power must precede its exercise. In interpreting statutes authorizing the sale of land for non-payment of taxes, the title to be acquired must be regarded as *stricti juris*. Whoever sets up a tax title must show that all the requirements of the law have been complied with, unless the former owner is the purchaser. *Cahoon v. Coe*, 57 Hall, N. H. 556.

**3320.** A party who has no title to lands, cannot acquire one by mere payment of taxes on them. *Homestead Co. v. Valley Railroad*, 17 Wall. U. S. 153.

**3321.** A party by paying taxes which another party ought to pay, but does not pay, cannot make such second party his debtor by having stepped in and paid the taxes for him, without being requested so to do. *Ibid.*

**3322.** It seems that a foreign corporation may not be taxed here either on account of its property situated out of the State, its business done elsewhere, or its corporate franchise. *People v. Equitable Trust Co.*, 96 N. Y. 387.

## TENDER.

**3323.** *Tender* of payment to one of several creditors and a demand from him of an assignment of the security, although the security may not be in his possession, bind, all the obligees, and his refusal is equivalent to the refusal of all. *Merriken v. Goodwin, et al.*, 2 Del. 236.

**3324.** Where a debt is unliquidated, the acceptance by the creditor of money tendered by the debtor as "in full of all account," precludes the creditor from recovering more. And this, although the creditor declares at the time that he receives it only to apply on the debt, so long as the debtor does not assent to his so receiving it. *Potter v. Douglass*, 44 Conn. 541; *Clark v. Dinsmore*, 5 N. H. 136; *Miller v. Holden*, 18 Vt. 340.

**3325.** Where a purchaser of stock makes a demand for the same, and is ready to pay the price, but the seller refuses to comply, on the ground of his inability to deliver it, no further tender is requisite. *Wheeler v. Garcia*, 40 N. Y. 584; *Currie v. White*, 45 N. Y. 822, reversing *S. C.*, 1 Sw. 166; *S. P.*, *Bellinger v. Kitts*, 6 Barb. 273.

**3326.** The indorser of a note, on a tender of payment, may insist on its delivery to him, as a condition of such payment. *Wilder v. Seelye*, 8 Barb. 408.

**3327.** To constitute a tender, there must be a production and manual offer of the money, unless dispensed with by some positive act or declaration on the part of the creditor. *Bakeman v. Pooler*, 15 Wend. 637; *Strong v. Blake*, 46 Barb. 227; see *Holmes v. Holmes*, 12 Barb. 137; *Bellinger v. Kitts*, 6 Barb. 273; *Meserole v. Archer*, 3 Bos. 376; *Vaupell v. Woodward*, 2 Sand. Ch. 143.

**3328.** A tender, by the president of a bank, in money belonging to the bank, to his private creditor, is not sufficient; inasmuch as the act would be a fraud both on the part of the debtor and creditor, who had notice of the ownership of the funds. *Reed v. Bank of Newburgh*, 6 Paige, 337.

**3329.** An offer in writing to pay a debt when not accepted is a sufficient tender of money under the code, and such tender will discharge a lien for such defendant, on personal property, created by a chattel mortgage. *Bartel v. Lope*, 6 Oregon, 321.

**3330.** Tender of advances and charges on goods to a warehouseman is unnecessary if upon an offer to pay the same he declines to state the amount. So, also, if he declines to deliver the goods upon another ground, as that his receipt for the goods is outstanding. *Hanauer v. Bartels*, 2 Colorado, 514.

**3331.** A tender does not extinguish the right of action, but only precludes a claim for interest. *Raymond v. Bearnard*, 12 Johnston, 274; *Kelly v. West*, 4 J. & Sp. 304. The only effect of a tender after judgment is to bar a claim for damages or interest. *Lansing v. Low*, 5 Cow. N. Y. 248.

**3332.** A mortgage debtor must seek his creditor to pay the interest on his mortgage, if he is within the State, and for this purpose must go to the residence or place of business of the mortgagee. A tender of interest, if not made to the creditor, must be to one author-



ized by him to receive it. 50 Howard, N. Y. Practice Reports; also, 55 Howard, N. Y. Practice Reports, 188.

**3333.** When the vendee of an animal, after discovering its unsoundness, tenders it back to the vendor, who declines to accept it, the vendee may recover the expenses of keeping over such reasonable time as will be necessary to make a fair sale. *Huston v. Plato*, 3 Colo. 402.

**3334.** In order to constitute a legal tender, the money must either be produced and shown to the creditor, or its production expressly or impliedly dispensed with. Where, therefore, to prove a tender of a quarter's rent, for which the defendant had distrained, the evidence showed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord "Here is the rent," which he had, and told the landlord he had, in his right hand, in a desk—but did not produce it or show it to the landlord, who said nothing and left the premises: *Held*, that there was no evidence of a tender, or of a dispensation with a tender. Per Gwynne J.—To divert a landlord of his right to distrain, a strict legal tender must be shown. *Matherson v. Kelly*, 24 Up. Canada Com. Pleas Rpts. 598.

**3335.** The payee of an ordinary promissory note, which was not payable at bank, placed the same in a sealed envelope, with other papers, and deposited the same in a bank as a "special deposit." By inadvertence the officers of the bank took the note out of the package, and notified the maker of the time of its maturity, not, however, claiming ownership; whereupon the maker, at its maturity, tendered to the cashier the amount due, which he declined to receive, stating that he was instructed not to receive it, whereupon the maker afterwards paid the same to the holder, declining to pay the interest after maturity. *Held*, in an action on the note, for such interest, that such tender was invalid, and that the maker was liable for the interest. *Held*, also, that a court of equity can not supply a defect in a tender, and that it is the duty of the debtor to seek the creditor, and pay the debt, at its maturity. *King v. Finch*, 60 Ind. 420.

**3336.** It seems that in an action against a third party, whose title depends upon a contract claimed by plaintiff to have been rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract, of a return of what plaintiff received. *Town of Springport v. Teutonia Savings Bank*, 84 N. Y. 403.

**3337.** Where a tender has simply the effect to extinguish a lien and does not discharge the debt payment into court is not required. *Cass v. Higenbotam*, 100 N. Y. 248.

## TRADE MARK.

**3338.** A. C. & Co., being the successors by purchase of Stillman & Co., woollen manufacturers, continued to use "Stillman & Co." as trade mark on their ticket for goods. Latimer, Stillman & Co., the lessees of a mill formerly used by Stillman & Co., known both as the "Stillman Mill" and as the "Seventh Day Mill," used "Stillman's Mills" as a trade mark. On a petition for injunction, brought by A.

C. & Co. against Latimer, Stillman & Co., to prevent their so using the word "Stillman," it appearing that no deception could be charged on either complainants or respondents, and that no person of the old firm of Stillman & Co. was a member of the firm of A. C. & Co.: *Held*, that the injunction could not be granted. *Held*, further, that a manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose is intended. *Query*: If a trade mark whose reputation depends on the excellence of the manufacture, or the skill and honesty of the manufacturer, can be legally assigned?

**3339.** If the English practice of retaining a firm name, when no original partner remains, is generally recognized in American law? *Carmichel v. Latimer*, 11 R. I. 395. See *Motley v. Downman*, 3 M. & C. 1; also, *Crawshay v. Thompson, et al.*, 4 M. & C. 357.

**3340.** Where a manufacturer has habitually stamped his goods with a particular mark or brand, a court of equity will restrain another party from adopting it for the same kind of goods. *McLeon v. Fleming*, 96 U. S. S. C. 245.

**3341.** An action cannot be maintained to restrain a defendant from selling his own goods in packages and with labels he has a legal right to use, and which do not infringe upon any trade mark of the plaintiff, because of fraudulent representations and devices on the part of defendant to palm off his goods as those of the plaintiff. *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292.

**3342.** Where a label adopted by a merchant to designate goods manufactured by him, and for which he had built up a large trade, has been simulated by another merchant, placed upon inferior goods, and put upon the market, an action in the nature of an action for deceit will lie, at the suit of the former. *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277.

**3343.** Specific damages need not be shown in such a case, but the jury may assess such damages as they may, on the whole evidence, be satisfied has been sustained. *Ibid.*

**3344.** That the label bears a name the use of which could not in equity be protected as a trade mark, will not prevent a recovery where the label is imitated in size, shape, color, device and general appearance. *Ibid.*

**3345.** Where the words in a label adopted as a trade mark are substantially true, and contain nothing calculated to deceive the public, that they are not literally true will not deprive the merchant of the protection of the law. *Ibid.*

## TRANSITU.

**3346.** A. sold goods to B., to be paid for upon their delivery, either in cash or in the notes of B. The goods were shipped on a vessel under a bill of lading, by which they were to be delivered to B. on his paying the freight. Before the vessel arrived, B.'s notes were protested because of his inability to pay them in the usual course of business, and an agent of A., having heard that B. had failed, sent



a person to stop the goods *in transitu*. This person, whose acts were subsequently ratified by A., before B. paid or tendered the freight, or came into possession of the goods, but after they had been attached by a creditor of B., demanded the goods of the master of the vessel, and forbade his delivering them to B. Held, that A. had seasonably exercised the right of stopping the goods *in transitu*. *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12.

## TRIAL.

**3347.** Where a plaintiff fails to prove the cause of action set up in his complaint, and the objection is raised upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in plaintiff's favor, upon a cause of action entirely separate and distinct from that alleged, cannot be sustained on appeal. *Southwick v. First Nat. Bank*, 84 N. Y. 420.

**3348.** When it will not be presumed even to sustain judgment, that a ruling on trial was made on a purely technical ground, not affecting the merits. See *C. N. Bank v. Phelps*, 86 N. Y. 484.

## TRUSTEE.

**3349.** Promise by a trustee to allow his personal debt as a credit upon a note held by him as trustee, is not binding on the trust. Breach thereof is no defence to the note, even though the personal debt may have become debarred by the statute from delay to sue induced by the promise. *Vason, et al. v. Beall, Trustee*, 58 Ga. 500.

**3350.** A father made a deposit in his own name as trustee for his daughter, and died. The daughter, while a minor, married, and the husband and minor wife preferred a petition for the appointment of a new trustee. Held, that the decree appointing a new trustee shall direct him to pay the interest of the deposit to the wife, but not to pay over any part of the principal without an order of the court. *O'Brien, Petitioner*, 11 R. I. 419.

**3351.** A trustee of a fund for the security of an indebtedness to others, who as such is plaintiff in an action to enforce such indebtedness, may appeal from a judgment which reduces and limits the number of those who are creditors upon the fund; he is aggrieved by the judgment when a real claim is not added into the amount adjudged to be due, and a real claimant is shut out by it from a share in the proceeds. *Bockes v. Hathorn*, 78 N. Y. 222.

**3352.** The cashier of a bank which is the *cestui que trust* in a deed of trust should not act as trustee under the deed: and where he does so, and by improper statements deters others from arranging to save the property from sale, and where the advertisement names an impossible day for sale by giving the wrong day of the week, the owner of the equity is properly allowed to redeem after the sale, at which the bank becomes the purchaser. *Thacker v. Tracy*, 8 Mo. App. 315.

**3353.** Where, in an action brought to obtain the construction of a will which created a trust, after judgment had been entered determining the rights and interests of the parties, P. purchased the shares of some of the defendants; *held*, that the court had jurisdiction to make him a party to the accounting of the trustees, and to compel him to abide the result of the accounting, and if he had received more of the fund than he was justly entitled to, the court had power to compel him to restore the excess by order, without action being brought against him. *Savage v. Sherman*, 87 N. Y. 277.

**3354.** The directors of a corporation, if through gross negligence and inattention to the duties of their trust they suffer the corporate funds to be lost or wasted, are liable for the loss so sustained. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

**3355.** No presumption of a resulting trust arises from a wife's possession of premises under a voluntary conveyance by her husband. *Osborn v. Osborn*, 29 N. J. Eq. 385.

**3356.** A person who acquires a legal title, with notice that the equitable title is in some other person than his grantor, will be decreed to hold the legal title for the benefit of the equitable owner. *Gale v. Morris*, 29 N. J. Eq. 222.

**3357.** A., an habitual drunkard, conveyed lands to B. without consideration, and B. immediately reconveyed to A., for life, with remainder to his heirs, reserving a nominal rent, which was never in fact paid or claimed. *Held*, that the two instruments must be construed together and that B. had no beneficial interest in the lands, but merely took the title in trust. *Moore v. Carling*, 29 N. J. Eq. 432.

**3358.** Where a trust fund has been perverted, the *cestui que trust* can follow it at law as far as it can be traced. *United States v. State Bank*, 96 U. S. S. C. (Otto) 30.

**3359.** Where the holder of one of several notes secured by a trust assignment without preference has, under a bill filed by him against the grantor and trustee alone, had the property sold and the proceeds applied to the satisfaction of his note, the holders of the other notes may, by suit in this court, hold him liable for their proportion of the proceeds. *Smith v. Cunningham*, 2 Tenn. Chancery, 565.

**3360.** If one, having an interest in land, is induced to confide in the verbal promise of another that he will purchase at sheriff's sale for the benefit of the former, and in consequence is allowed to obtain legal title, his denial of the confidence is such fraud as will make him a *trustee ex maleficio*. *Wolford v. Harrington*, 74 Penn. St. 311.

**3361.** Where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his ability is the loss arising from his not having invested in the less beneficial of the authorized modes. *Patterson v. Lailey*, 18 Grants Chancery, Ontario, 13.

**3362.** The purchaser of property at trustee's sale, takes it subject to incumbrances, and is not entitled to any abatement in the price by reason of such incumbrances. *Pickett, et al. v. Merchants' Nat. Bank of Memphis, et al.*, 32 Ark. 346.

**3363.** The Supreme Court has not the power to destroy a valid trust. *Douglas v. Cruger*, 80 N. Y. 15.

**3364.** Receiver of insolvent life insurance company, duty of, in dis-



tribution of fund. See *In re Atty. Gen'l v. N. A. L. Ins. Co.*, 85 N. Y. 485.

**3365.** To constitute a valid express trust it is not necessary that the purpose of the trust should be stated in the precise words of the statute; it is sufficient if the intention to create the trust can be fairly collected from the instrument. *Morse v. Morse*, 85 N. Y. 53.

**3366.** An assignee of a claim against a manufacturing corporation may maintain an action against a trustee thereof, to enforce the liability for its debts given by the General Manufacturing Act because of failure to file an annual report, or because of signing a false report. *Pier v. George*, 86 N. Y. 613.

**3367.** B. deposited in a savings bank certain moneys in his own name as trustee for R. B. gave the bank book to R., who returned it to B., in whose control it remained. B. was childless, R. was his step-daughter. It was in evidence that B. was a man of few words and that he treated R. as his daughter. In an equity suit by R. against the administrator of B., claiming the deposit as trust funds held by B. for R., *Held*, that the trust was completely constituted. *Held*, further, that the trust being constituted, the fact that it was voluntary was no reason for refusing relief.

**3368.** To constitute a trust, it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally conveys it to another in trust, or if the owner of personalty unequivocally declares, either orally or in writing, that he holds it *in præsentî*, in trust for another. A bill in equity to enforce a trust, brought against an administrator, alleged that the respondent as administrator withdrew a bank deposit, being the trust funds in question. The answer alleged the respondent's appointment as administrator in Massachusetts, and that as such he withdrew the deposit and held the same as part of his decedent's estate:

**3369.** *Held*, in the absence of denial by the administrator that he held the deposit as administrator in Rhode Island, that the court would presume he held it as administrator in Rhode Island, and would order him to account directly with the complainant, the trust having been proven. *Ray v. Simmons*, 11 R. I. 266; also, *Stone, et al. v. King, et al.*, 7 R. I. 358. It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he hold it *in præsentî* in trust or as a trustee for another. *Ex parte Pye*, 18 Ves. Jun. 140; *Milroy v. Lord*, 4 De G. F. & J. 264; *Richardson v. Richardson*, L. R. 3 Eq. 686; *Kekewick v. Manning*, 1 De G. M. & G. 176; *Morgan v. Malleson*, L. R. 10 Eq. 475; *Penfold v. Mould*, L. R. 4 Eq. 562; *Wheatley v. Parr*, 1 Keen., 551 and note; *McFadden v. Jenkyns*, 1 Hare, 458.

**3370.** The mere making of a deed to one as trustee does not vest the party with title as trustee, if he never in any form accepted the trust. *Armstrong v. Morrill*, 14 Wall. U. S. 120.

**3371.** Receiver, *held* properly chargeable with interest on trust funds deposited to his private account in bank. *Henckley v. Railroad Co.*, 100 U. S. 153.

**3372.** Conveyance of land by deed absolute, but on parol conditions to pay grantor's debts, except that vendee's liability on a certain

mortgage should not exceed amount realized on same, creates a trust, not a mortgage. *Flagg v. Walker*, 113 U. S. 650.

**3373.** A purchaser by quit claim deed before the maturity of the purchase money notes, or of any of them, will be considered as holding insubordination to the superior title, dependent upon the payment of the purchase money, and not adversely to it. While that relation existed between the party in possession and the holder of the purchase money notes, limitation would not run in favor of such possession. A sale by the holder of such superior title (the original vendor) to another, would be a repudiation of such relation, and from which limitation would run. Until such repudiation by one of the parties, and made known to the others, limitation would not run against the notes, or by three, five or ten years' possession of the land, so as to defeat the right of the original vendor to recover the land under his superior title. *Roosevelt, et al. v. Davis*, 49 Texas, 463.

**3374.** It is the duty of a trustee for sale to use all diligence to obtain the best price; and where a trustee sold property at private sale, without previous advertisement, at a price lower than other persons were willing to give, and did not first communicate with these persons, though informed of offers of the higher price made by them to one of the *cestui que trust*; the trustee was held responsible for the loss. In such a case the absence of any fraudulent motive in the trustee is no defence, nor is evidence of witnesses that the property was worth no more than the trustee obtained for it. The trustee deposed that he had disbelieved the statement of *cestui que trust*. *Held*, no excuse for not testing the truth of the statement by reference to the parties. *Graham v. Yeomans*, 18 Grant's Chancery, Ontario, 238.

**3375.** A trust fund is traceable into whatever character of property it may be converted, and is still impressed with the trust; and the confusion or mixing of the trust estate with the trustee's own property will not prevent the separation of the former from the latter. Where a guardian buys land with the funds of his ward, though not under the direction, or even by authority of the court, and takes the title in his own name, with the addition, "trustee," he cannot as legal owner convey to a subsequent purchaser a good title to such land, "free from embarrassment and reasonable doubt," notwithstanding the guardian may also have an individual interest in the same; but a purchaser with notice would take the title, subject to the right of the ward to pursue the fund into the land and hold it. *Morrison v. Kinston*, 55 Miss. 71.

**3376.** Where a depository of certain government bonds used some of them without the permission of the owner and substituted in their place a bond and mortgage, and the owner of the bonds upon hearing of the transaction satisfied it, *Held*, that neither the creditors of the depository, who had become insolvent when such approval was made, nor his trustee in bankruptcy, could complain of the transaction, there being no pretence that the property substituted was less valuable than that taken, or that the estate of the debtor was less available to his creditors. *Cook v. Tullis*, 18 Wall. U. S. 332.

**3377.** When property held upon any trust to keep, or use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its



transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*. It does not alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. *Cook v. Tullis*, 18 Wallace, U. S. 332.

3378. Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral security for the completion of the dwelling houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. *Kidd v. McCormick*, 83 N. Y. 391.

## USAGES OF TRADE.

**3379.** Where a party conversant with the rules and usages of the Chicago board of trade employed a commission merchant to make purchases of grain for future delivery for him, and afterwards sued the merchant for a loss incurred by the sale, which was made for want of necessary advances to meet a decline in prices, it was *held*, that proof of the usages of the board of trade was properly admitted to justify the act of the defendant. *Corbett v. Underwood*, 83 Ill. 324.

## USURY.

**3380.** A note and mortgage executed to secure a loan of gold at a higher rate of premium than the market value of the gold are usurious. Defendant was desirous of negotiating a loan from plaintiff, and on that day he procured from plaintiff \$1,700 in gold coin, and executed his note therefor for \$2,000 payable in one year, with interest at ten per cent. At the time the premium upon gold was from  $3\frac{3}{4}$  to 10 per cent. The defendant testified that he was to allow 10 per cent. premium upon the gold, and was to pay 15 per cent. interest for the use of the money; that the 10 per cent. premium and 5 per cent. interest were taken out of the sum called for upon the face of the note, and that the arrangement was made as a cover for usury. *Austin v. Walker*, 45 Iowa, 527. It was said "The form of the transaction is nothing, the cardinal inquiry being, when the contract specifying the amount reserved is express, did the parties resort to it as the means of disguising the usury, in violation of the laws of the State where the contract was made or to be executed?" And, in arriving at this intention, all the facts are to be taken in consideration. *Arnold v. Potter*, 22 Iowa, 194.

**3381.** A surety cannot avail himself of usury paid by his principal. *Lamoille County National Bank v. Bingham*, 50 Vt. 105.

**3382.** Although the code provides the mode and manner in which a defendant may plead usury, its provisions do not in any manner deprive a party of existing remedies for relief against the payment of illegal interest, even though he may have failed to avail himself of the plea. Such being the law, there is no reason why a party may not accept to the confirmation of an award on the ground of usury, even though no such defence was made before the arbitration. *Woods v. Matchett*, 47 Md. 390.

**3383.** Appeal from the Circuit Court for Carroll county, in equity. On a bill filed to restrain the execution of a judgment of fraud, it was *held*: 1st. That the complainant had not made out a case entitling him to have the judgment set aside. 2d. That inasmuch as there appeared to have been usurious charges against him in the transaction between him and the defendants, he was entitled to have the judgment reduced to the sum found to be due by charging him with the net amount loaned him, and the average interest thereon, and allowing him for the amount of credits to which he was entitled, including bonus and interest on bonus. 3d. That although it was quite probable



that this method did not ascertain the precise amount of usury paid by the complainant, yet no more could be allowed him, as there was no proof in the record to justify the court in allowing any more, owing to the defective manner in which the complainant had kept his accounts, and his own forgetfulness of matters material to their elucidation. *Hill v. Reifsnider, et al.*, 46 Md. 555.

**3384.** The taking of a premium upon making a loan or advance upon the shares of a member is authorized by the statute (§ 7) and does not render the loan usurious. *Con. S. & A. Ass'n v. Read*, 93 N. Y. 474.

**3385.** In computing the interest as the trial court found "by inadvertence and mistake in the computation of time, and not with the purpose and intention of evading the statute against usury, or in violation thereof," the lender retained interest for twenty days too much. *Held*, that this was not usury; and that the court, in an action to foreclose the mortgage, properly applied the excess in diminution of the sum secured. *Bevier v. Covell*, 87 N. Y. 50.

**3386.** The statute of this State regulating the rate of interest is merely a penal law and has no extra-territorial force. *West T. & C. Co. v. Kliderhouse*, 87 N. Y. 430.

**3387.** Certain notes had been given by defendant to R., plaintiff's assignor, which were usurious; a judgment for the full amount of the note was entered, and the bond in suit was given, in pursuance of an agreement, made to evade the statute against usury, between R. and defendant, that the latter should allow such judgment to be entered, and should then give the bond in satisfaction thereof. *Held*, that the judgment was not a bar to the defence of usury. *Moses v. McDivitt*, 88 N. Y. 62.

**3388.** An allegation in answer that the complainants, as executors, received a certain amount usuriously, is not sustained by proof that one of them individually received a part of such sum from defendant's agent. *Cleveland v. O'Neil*, 29 N. J. 457.

**3389.** Suit by a national bank upon a bill of exchange; defence, usury. The bank, in discounting the bill, reserved a greater amount than was allowed for interest by the law of the State where it was situated. There was no proof of the current rate of exchange. *Held*, that the bank was entitled to recover. *Wheeler v. National Bank*, 96 U. S. 268.

**3390.** As a general rule, in setting up the defence of usury, the usurious contract must be described with precision and accuracy, and proved as laid. *Cox v. Westcoat*, 29 N. J. 551.

**3391.** But when the complainant voluntarily confesses the taking of usury, and there is a variance between the contract alleged and that proved, the court, in order to give the defendant the benefit of facts admitted, will direct an amendment of the answer. *Cox v. Westcoat*, 29 N. J. 551.

**3392.** Under our former statute, usury was a cause of forfeiture of all interest, and a promise to pay usury was not a sufficient consideration for a promise to forbear. *Roberts v. Stewart*, 31 Miss. 664. But under our present statute, usury forfeits only the illegal excess, and the right to get interest for a given time is a valuable consideration to uphold a promise to forbear, and the illegal excess is appropri-

able in legal contemplation to the discharge *pro tanto* of principal. *Brown v. Prophit*, 53 Miss. 649.

**3393.** Where a sale is made under a mortgage, whether the contract was usurious or not is immaterial as an inquiry as to the validity of the sale; usury affects only the distribution of the proceeds, not the sale itself. If more than legal interest has been extorted by the mortgagee, the court, in distributing the proceeds, may direct it to be withheld or refused. *Carroll v. Kershner*, 47 Md. 262.

**3394.** Defendant indorsed certain notes for the accommodation of D., which were discounted by plaintiff. In an action upon the indorsements defendant offered to show that plaintiff in its dealings with D. took upon discounts made for him more than lawful interest. *Held*, that as the offer embraced transactions with which defendant was not connected, it was too broad, and so was properly rejected. *First Nat. Bank v. Wood*, 71 N. Y. 405.

**3395.** It will not be presumed that a note dated on one day for a sum payable with interest from a day previous, was for money first lent on the day of the date. *Ewing v. Howard*, 7 Wall. U. S. 499.

**3396.** When an agreement is entered into between a factor and a holder of produce for an advance of money on the produce as part of an entire contract, embracing the storage, safe keeping and sale of the produce, and the compensation stipulated is greater than the legal rate of interest on the advance, it is a question of fact whether usury was intended, and if relief is sought on the ground of usury the fact must be averred in the bill and established by proof. Thus, where the complainants, as manufacturers of whisky, made a contract with the defendants, factors and commission merchants, for the storage of their whisky and an advance of money thereon, upon certain terms and conditions, the commission and charges agreed to be paid being more than the legal rate of interest on the advances, it was *held*, upon a bill filed stating a contract which was not usurious and not established by proof, that the complainants were not entitled to relief, although the agreement proved was for a rate of compensation greater than legal interest on the money advanced. *Stark v. Sperry*, 2 Tenn. Eq. 304.

**3397.** Hartman lent money to Duphorn for a year at 8 per cent., on a note, stated to be at 6 per cent., with Danner as surety; about maturity Hartman agreed to an extension for a year, upon Duphorn paying 2 per cent. usury, and in the same way for a third year. The usury was paid after the maturity of the note. Danner had no knowledge of the usury or the extensions. *Held*, that the contract for usury being illegal, it was without consideration, and therefore not binding on Hartman, and he could recover from Danner notwithstanding the giving of time. The payment of the usury after maturity of the note was a payment on account, which the debtor was under obligation to make, and therefore no advantage to one, or disadvantage to the other, so as to create consideration. *Hartman v. Danner*, 74 Penn. St. 36.

**3398.** If an usurious contract is made, whether expressed or implied, at the time of, or subsequent to the entering into of the agreement, to take or reserve more than lawful interest, it is such an agreement as falls within the prohibition of the statute. *Peddicord, et al. v. Connard*, 85 Ill. 102.

**3399.** If, where a party overdraws his account with a bank, the



bank, at the end of each sixty days, compounds the interest on the sums overdrawn, so as to make it the same as in discounting a loan, and the same is included in a note, the transaction will be tainted with usury, which may be set up in defence to a suit on the note, and no interest will be allowed on the sums overdrawn, either on the amount or the note. *Ibid.*

**3400.** The fact that a debtor voluntarily paid more than six per cent. interest, and made a settlement on that basis, does not preclude him from setting up a defence of usury to an action brought to enforce such settlement. *Marr v. Marr*, 110 Penn. 60.

**3401.** When the consideration of a confessed judgment is made up in part of usury the court will open the judgment and afford relief. *Ibid.*

**3402.** Where a party having an account in bank, which he overdraws from time to time, makes a settlement with the bank by having his bank book written up and his checks surrendered, and he paying the charges made against him, he cannot, after a considerable lapse of time, open such settlement to recover unlawful interest charged to him on the sums overdrawn. *Ibid.* 102.

**3403.** In a suit upon a note the defendant, in her affidavit of defence, averred that the loan for which the note was given had been carried by her father for two years, at ten per cent. interest, and that the note signed by her was the renewal of one which was the last of a series given by him. The court below entered judgment for the amount of the note, and only abated the excess of interest for the four months which defendant's note had run: *Held* (reversing the court below), that she had the right to set up also the excess of interest paid by her father against the plaintiff's claim. *Miller v. Irwin*, 85 Penn. 376.

**3404.** In April, 1870, the plaintiff executed four promissory notes, payable in one year, with interest at ten per cent., which were secured by mortgage on real estate. After the maturity of the notes the plaintiff indorsed thereon the following promise: "For value received I promise to pay twelve per cent. per annum from maturity until paid. Signed. T. W. T. R., Nov. 29, 1871." *Held*, that the notes were not affected with usury. The promise indorsed on the notes by the plaintiff is utterly void, and cannot modify or impair the original contract. If the original contract is *bona fide*, and wholly free from the taint of usury, then no subsequent agreement to pay usury, or an usurious premium upon the debt, will invalidate the original contract with the vice of usury, or prevent a collection of the debt with legal interest. *Richards v. Hountze*, 4 Neb. 206.

**3405.** Usury is the charging of unlawful interest, and unless there is a law which limits the rate of interest to be charged for the use of money, there can be no usury. *Newton v. Wilson, et al.*, 31 Ark. 484.

**3406.** It is sufficient to sustain the defence of usury if the weight of evidence be in its favor. *Chew v. Ferrari*, 29 N. J. Eq. 380.

**3407.** If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made. *Railroad Co. v. Bank of Ashland*, 12 Wall. U. S. 226.

**3408.** The assignment merely of an expected surplus in property pledged to secure an usurious loan does not entitle the assignee to avoid the lien or to claim the property free therefrom. *Dalton v. Smith*, 86 N. Y. 176.

**3409.** Plaintiff's complaint alleged among other things, and his proof tended to show, that as security for a loan of \$2,000, he assigned a \$4,000 bond and mortgage under an usurious agreement to the effect that the defendants should retain the interest on the \$4,000; and when the full amount of the bond was paid should pay the plaintiff \$2,000. Defendants foreclosed the mortgage, bid in the mortgaged premises for \$2,000, and subsequently sold them for \$5,000. The court charged in substance that if the jury should find that the transaction was a loan and this was usurious, the plaintiff was entitled to recover the value of the property at the time of the assignment of the mortgage, over the \$2,000 loaned and interest. Defendants' counsel excepted and requested the court to charge that if plaintiff was entitled to recover at all on account of an usurious loan, he was entitled to the whole value of the property without any deduction for the loan; this request was refused. *Held*, that the rule as presented in the request was correct, but that as the error was in defendants' favor, they could not complain; that it was not a legitimate presumption that the jury were governed in their findings of facts by the amount of their verdict. *Dalton v. Smith*, 86 N. Y. 176.

**3410.** To constitute usury it must be shown that the additional interest was paid or retained in pursuance of a mutual agreement. *Morton v. Thurber*, 85 N. Y. 550.

**3411.** Where an agreement was made to loan money at lawful interest, but at the time of executing the securities the lender required and the borrower assented to the allowance of a sum falsely represented by the former to have been an expense incurred in procuring the money, *held*, that this was not usury. *Morton v. Thurber*, 85 N. Y. 550.

**3412.** In the securities given for the loan was included the amount of a former loan. The only usury alleged was the charge and allowance of said item of expense. The facts in relation to the former loan were proved, but there was no finding, or request to find, that the agreement therefor was usurious. *Held*, that the question could not be raised here. *Morton v. Thurber*, 85 N. Y. 550.

**3413.** Where a party executes his note for money loaned him, bearing him ten per cent. interest, with a provision that if the same is not paid within ten days after maturity, interest shall afterwards be paid at the rate of twenty per cent., as liquidated damages, there will be no error in allowing such rate in accordance with the contract, especially where usury is not pleaded. *Walker, et al. v. Abt., et al.*, 83 Ill. 226.

**3414.** On petition for foreclosure, brought by the purchaser of the mortgage notes against the purchaser of the equity of redemption, the defendant sought to abate the claim by showing that the notes were given in part for usurious interest. *Held*, that the right so to do was personal to the maker of the notes, the same as the right to recover money paid for usury is personal to the payer. *Reed v. Eastman*, 50 Vt. 67.



**3415.** If a party loans money, and at the same time sells lots to the borrower at a fictitious value, taking a note for the whole, merely to secure an unlawful rate of interest on the loan, the transaction will be usurious. But the fact that a party sells property and loans the consideration to the purchaser, with other funds, affords no presumption the transaction is usurious. *Mosier v. Norton, et al.*, 83 Ill. 519.

**3416.** The defence of usury is regarded as in the nature of a penal action, and not only is great strictness required in the pleadings, but the contract must be proved as alleged by a clear preponderance of the evidence. *Ibid.*

**3417.** No one but the person paying usury can recover it back. Thus, an accommodation maker of a promissory note cannot avail himself in a suit upon the note he has so given, of a payment of usury thereon by the party accommodated. *Aliter* of interest paid by such party. *Cady v. Goodnow*, 49 Rowell, Vt. 400.

**3418.** Purchaser of mortgaged property, who paid full price for same, may set up usury in mortgage, though it had been foreclosed, and the usurious interest paid, before his purchase. *Lilienthal v. Champion, et al.*, 58 Ga. 158.

**3419.** Interest in excess of six, but not exceeding ten, per cent. per annum, voluntarily paid for the use of money, cannot be recouped, though no agreement in writing was made for its payment. *Reynolds v. Rondabush*, 59 Ind. 483.

**3420.** By the act of March 9, 1867 (1 R. S. 1876, 599), concerning interest on money and the recoupment of usury, so much of section 5 of the act of March 7, 1861 (1 R. S. 1876, 599), on the same subject, as amended by the act of December 19, 1865 (3 Ind. Stat. 316), as prohibited the recoupment of usury, was repealed, but that part of such section prohibiting a direct action therefor is still in force. *Holcraft v. Mellott*, 57 Ind. 539. Where, in an action on a promissory note wherein the defendant answers, seeking to recoup usurious interest, alleged to have been paid, the plaintiff dismisses his complaint, such dismissal carries all the pleadings out of court, and the defendant cannot prove or recover such usury. *Ibid.*

**3421.** Recoupment of usurious interest, alleged to have been paid on a promissory note in suit, can be had only to the extent of any balance due on such note, and judgment for any excess of such usury can be rendered. *Ibid.*

**3422.** In recoupment the defendant can only use his claim in diminution or abatement of the plaintiff's cause of action, and cannot, as in set-off, recover for the excess of his claim over that of the plaintiff. *Ibid.*

**3423.** The taint of usury cannot be eradicated by the substitution of one security, or one set of securities, for another, so long as the original debt survives. *Miller v. Irwin*, 85 Penn. 376.

**3424.** Usurious brokerage taken by a third person, whether an agent of the mortgagee or not, if taken without his knowledge or consent, will not taint the mortgage. The rule that such brokerage, to be valid, must be taken by virtue of an independent agreement between the borrower and the broker, not approved. *Gray v. Blarcom*, 29 N. J. 454.

**3425.** Where usurious interest is reserved or charged on a note or

bill discounted by a national bank, the entire interest reserved or charged will, in an action on the note or bill, be adjudged forfeited. The action authorized by section 30 of the national Banking Act of 1864, to recover from the bank twice the amount of usurious interest paid, was within the jurisdiction of the State courts. *Hade v. Mc Vay, Allison & Co.*, 31 Ohio (DeWitt) 231.

**3426.** To render a transaction usurious, there must be an unlawful or corrupt intent, confessed or proved. *Nourse v. Prime*, 7 Johns. Ch. 69; *Woodruff v. Hurson*, 32 Barb. 557.

**3427.** Taking more than legal interest by mistake is not usury. *Marvin v. Hymers*, 12 N. Y. 223; *Mosher v. Randall*, 52 N. Y. 649; *Bailey v. Lane*, 21 How. Pr. 475.

**3428.** If the plaintiff's principal and interest are both put at hazard, the contract is not usurious, however hard and unconscionable the bargain. *Cummings v. Williams*, 4 Wend. 679; *Spencer v. Tilden*, 5 Cow. 144; *Holmes v. Wetmore*, 5 Cow. 149; *Pomeroy v. Ainsworth*, 22 Barb. 118.

**3429.** A contract is not usurious, if it depend on *contingencies*, whether, on return of the property, the lender will have received more than its value at the time of making the contract, and legal interest thereon. *Hall v. Haggart*, 17 Wend. 280.

**3430.** Where one man advances money to purchase lands for the benefit of himself and others, to be refunded with interest, out of the proceeds only, a stipulation that he shall receive more than an equal proportion of the lands, in consideration of such advance, is not usurious. *Queckenbush v. Leonard*, 9 Paige, 334.

**3431.** A loan of money upon condition that the borrower would sell to the lender real estate of a speculative character, to the amount of the loan, at its then market value, is not usurious, though both parties expected it would greatly increase in price. *Fellows v. American Life Ins. & Trust Co.*, 1 Sand. Ch. 203.

**3432.** The usual rule for the construction of pleadings applies as well to an answer of usury as to one setting up any other defence. *Lewis v. Barton*, 106 N. Y. 70.

**3433.** There can be no usury on a loan of chattels, whatever the percentage upon their value agreed to be paid for their use, unless intended as an indirect loan of money. *Bull v. Rice*, 5 N. Y. 315.

**3434.** A loan, secured by a pledge of stock, under an agreement that the lender shall have the benefit of their rise in value, is usurious. *Cleveland v. Loder*, 7 Paige, 557.

**3435.** If the purchaser of land, who has paid a considerable portion of the purchase money, be unable to pay the balance on the day fixed, and the fiction of a re-sale be resorted to, as a cover for usury, the second contract is void, but the balance of the original purchase money is recoverable. *Crippen v. Heermance*, 9 Paige, 211.

**3436.** If the vendor of land agree to sell for \$10,000 in cash, but the vendee being unable to pay cash, it is agreed that a deed and bond and mortgage for \$12,000, payable at a future time, with interest, shall be executed, to remain in the vendor's hands, until he can dispose of the bond and mortgage for \$10,000, which is done; the transaction is not usurious. *Brooks v. Avery*, 4 N. Y. 225.

**3437.** A usurious loan on a contract to procure the assignment of



choses in action, at a future day, which have then no existence, and the loan being ultimately secured by the notes of the borrower, is void. *Seymour v. Strong*, 4 Hill, 255; *Rapelye v. Anderson*, 4 Hill, 472.

**3438.** A loan made by an insurance company, on condition that the borrower will effect an insurance with them, on the ordinary terms, is not usurious. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; *New York Fire Ins. Co. v. Donaldson*, 3 Edw. Ch. 199.

**3439.** A loan-company, authorized to loan money on pledge, and to charge interest for a full month, where the loan is for a period of over fifteen days and less than one month, is not entitled, where a loan made for twenty days remains unpaid, to demand interest at the same rate for any subsequent time. *Macomber v. Dunham*, 8 Wend. 550.

**3440.** Giving a note for a larger sum than the party discounting it expected to advance, with an agreement that it shall be negotiated only for the amount advanced, is not usurious. *Schoop v. Clarke*, 1 Keyes, 181; S. C., 4 Abb. Dec. 235.

**3441.** The reservation of interest, payable quarterly, upon a sum payable at a future day, is not usurious. *Mowry v. Bishop*, 5 Paige, 98.

**3442.** Suit by a national bank upon a bill of exchange; defence, usury. The bank, in discounting the bill, reserved a greater amount than was allowed for interest by the law of the State where it was situated. There was no proof of the current rate of exchange. *Held*, that the bank was entitled to recover. *Wheeler v. National Bank*, 96 U. S. S. C. 268.

**3443.** A *bona fide* contract for the delivery of personal chattels cannot be usurious. *Stockwell v. Holmes*, 33 N. Y. 53.

**3444.** A note with interest from a day past, is not usurious on its face. *Marvin v. Feeter*, 8 Wend. 533; *Lynde v. Staats*, 1 N. Y. Leg. Obs. 89.

**3445.** The original taint of usury attaches to all consecutive obligations and securities growing out of the original vicious transaction. *Vickery v. Dickson*, 35 Barb. 96; S. C., 62 Barb. 272; *Stanley v. Whitney*, 47 Barb. 586.

**3446.** Discounting a note on the theory that 360 days make a year, though the practice be universal, is usurious. Payment and receipt of usurious interest is *prima facie* evidence of a corrupt agreement. *New York Farmers' Ins. Co. v. Ely*, 2 Cow. 678; *Bank of Utica v. Wager*, 2 Cow. 712; S. C., 8 Cow. 398; *Utica Ins. Co. v. Tilman*, 1 Wend. 555.

**3447.** If a person discounting a note, give a check payable in uncurrent funds, the transaction is not usurious, in the absence of an agreement that the amount should be so paid. *Codd v. Rathbone*, 19 N. Y. 37; S. P., *Slosson v. Duff*, 1 Barb. 432; *Robbins v. Dellaye*, 33 Barb. 77.

**3448.** Taking a security, bearing interest, and giving checks for the amount, payable in six months, without interest, is usury. *Lane v. Losee*, 2 Barb. 56.

**3449.** To constitute usury, there must be a loan, a taking of more than lawful interest, and a corrupt agreement. *Bank of Utica v. Wager*, 2 Cow. 712; *Talmage v. Pell*, 4 N. Y. 463; *Mumford v. American Life Ins. Co. and Trust Co.*, 4 N. Y. 463; *Crocker v. Colwell*, 46 N. Y. 212.

**3450.** An agreement to pay more than legal interest, made at the time of the loan, will avoid a note taken therefor, though on its face it be only for the amount loaned with legal interest; otherwise, of a subsequent agreement to pay usurious interest. *Merrills v. Law*, 9 Cow. 65; S. C., 6 Wend. 268; *Austin v. Fuller*, 12 Barb. 360.

**3451.** An agreement that the borrower shall receive uncurrent notes at a higher rate than their market value, renders the loan usurious. *Cleveland v. Loder*, 7 Paige, 557; *Pratt v. Adams*, 7 Paige, 615. Otherwise, if the discount be very trifling, and the notes pass current in the market in the way of trade. *Slosson v. Duff*, 1 Barb. 432.

**3452.** The purchase of accommodation proper for gross sum, which, on calculation, give more than seven per cent. discount is usurious. *Bossange v. Ross*, 29 Barb. 576.

**3453.** Accommodation note negotiated upon a usurious consideration is void. *Blodgett v. Wadhams*, Lalor, 65; *Callin v. Gunter*, 11 N. Y. 368; *Newell v. Doty*, 33 N. Y. 83.

**3454.** If a party accept stock at par, which is depreciated in the market, and give his bond and mortgage for the par value thereof, the transaction is not usurious. *Willoughby v. Comstock*, 3 Edw. Ch. 424.

**3455.** The loan of certain notes, at their nominal value, which are actually worth less than that amount, is not necessarily usurious as a matter of law, there being no intent to evade the statute. *Sizer v. Miller*, 1 Hill, 227; *Dry Dock Bank v. American Life Ins. and Trust Co.*, 3 N. Y. 344.

**3456.** A credit given on a payment in advance, for a larger sum than the actual payment, does not amount to usury; it is but a discount of a portion of the debt. *Righter v. Stall*, 3 Sand. Ch. 608.

**3457.** Nor is it usurious, on selling a note payable at a future day, with interest, to take a note for the principal and interest, computed to the day of sale, without making a rebate of interest. *Lynde v. Staats*, 1 N. Y. Leg. Obs. 89.

**3458.** If two persons exchange notes for the purpose of raising money, and one procure the other's note to be discounted at a premium exceeding the lawful rate of interest, the transaction is not usurious. *Rice v. Mather*, 3 Wend. 62; *Odell v. Greenly*, 4 Duer, 358.

**3459.** If notes be exchanged for the purpose of enabling one of the parties to sell the other's note at a usurious rate of discount, with the knowledge of the lender, the transaction is void for usury. *National Fire Ins. Co. v. Sackett*, 11 Paige, 660.

**3460.** If an accommodation note be sold at a usurious rate of discount, the maker is not estopped from setting up the defence of usury, though the payee represented it as business paper. *Hall v. Earnest*, 36 Barb. 585; S. P., *Parshall v. Lamoreaux*, 37 Barb. 189.

**3461.** The fact that the maker of an accommodation note takes security for his indemnity, does not render the note a security for value, so as to shut out the defence of usury. *Parshall v. Lamoreaux*, 37 Barb. 189.

**3462.** An exchange of notes with commission of two and a half per cent., if intended as a loan of money, is usurious. *Dunham v. Dey*, 13 Johns. 40; *Dunham v. Gould*, 16 Johns. 367; *New York Dry*



*Dock Co. v. American Life Ins. & Trust Co.*, 3 Sand. ch. 215, S. C., 3 N. Y. 344.

**3463.** Where, in an action on a promissory note, the defendant answers that such instrument is the last of a series of usurious renewals of a usurious promissory note, and that the real principal, and lawful interest thereon, have been overpaid, and asking to recoup the excess, an objection that the date of such renewals, and payments thereon, are not alleged, should be made not by demurrer, but by motion to make specific. *Holcraft v. Mellott*, 57 Ind. 539.

**3464.** Where usury was set up in the ordinary form appropriate to pleading usury taken in this State, and it appeared that the agreement was not made in this State, and it also appeared that a premium had been taken for loan of the money and a further premium for further forbearance: *Held*, that unless the complainant would deduct the premiums and all interest received thereon, the defendant should have leave to amend his answer so as to set up the taking of the premiums. *Glading v. Cuberly*, 29 N. J. 104.

**3465.** When usury is pleaded as a defence the usurious agreement must be proved as laid; whoever desires the aid of the statutes against usury through the interference of the court must make out his title to relief by allegations as well as proof. *L. I. Bank v. Boynton*, 105 N. Y. 656.

**3466.** When a commission merchant in Baltimore, advances to a pork packer, in Peoria (Ill.) \$100,000, for which he was to receive interest at the rate of ten per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide on all the facts whether or not the commissions were a cover for usury, or were an honest contract for commission business in connection with the use of money. *Cockle, et al. v. Flack, et al.*, (3 Otto) 93 U. S. Repts. 344.

**3467.** The express agreement of ten per cent. is not usurious, because lawful in Illinois, though not so in Maryland. *Andrews v. Pond*, (13 Peters U. S. 65.) Reaffirmed, 92 U. S. 344.

**3468.** Defendant H. entered into an agreement with B. Bros. & Co., by which that firm agreed to manufacture and deliver to H. 200 lumber wagons; he agreed to advance fifty dollars on each; the wagons were to be sold and H. to receive one-fourth of the profits and his advances, with interest at five and one-fourth per cent. In an action to charge H., as a partner, with a debt of said firm, *held*, that the agreement did not constitute a partnership, but was a contract for a loan, the provision as to profits being merely a mode of providing a compensation for the use of the money advanced; also, that if the contract was usurious, plaintiff could not avail himself thereof. *Richardson v. Hughitt*, 76 N. Y. 55.

**3469.** It seems, that such a contract is not usurious. *Richardson v. Hughitt*, 76 N. Y. 55.

**3470.** Where, upon the maturity of a promissory note given for a usurious loan, for the purpose of an extension, the borrower delivers to the lender a new note, by its terms made payable to a third person, which note is transferred by the lender to said third person, it is tainted with the usury, and is void in the hands of the payee, although

he received the same in good faith and without knowledge of the usury. *Treadwell v. Archer*, 76 N. Y. 196.

**3471.** The new note being taken by the usurer is equally void, as if it had been taken in his own name; and the maker is not estopped by the fact that the promise is in form made direct to the holder. *Treadwell v. Archer*, 76 N. Y. 196.

**3472.** Usury, as a defence, must be specially pleaded or set up in the answer to entitle it to consideration. *The Confederate Note Case*, 19 Wall. U. S. 548.

**3473.** It seems, that if the note had been taken, under the same circumstances of innocence, directly from the maker by the payee, in pursuance of an agreement to take it in discharge of a debt due to him from the lender, the maker would be estopped, and the payee could recover upon the note. *Treadwell v. Archer*, 76 N. Y. 196.

**3474.** The essential requisite to authorize summary proceedings under the statute (2 R. S., 513, §§ 28, *et seq.*) to remove a tenant holding over after the expiration of his term, is that the conventional relation of landlord and tenant exists: the person in possession may, under a denial by affidavit of the facts upon which the summons is issued, prove that the alleged lease was executed under and in pursuance of a usurious agreement, and is void; and so, that such relation does not exist. *People, ex rel., Ainslee v. Howlett*, 76 N. Y. 574.

**3475.** Usury is a defence personal to the parties to the contract, or their legal representatives, and cannot be set up by an assignee of the mortgagor, when seeking a redemption. *McGuire v. Van Pelt*, 55 Ala. 344.

**3476.** An agent's retention of a percentage as compensation for obtaining a loan on mortgage, without the mortgagee's knowledge, does not constitute usury. *Manning v. Young*, 28 N. J. Eq. 568.

**3477.** Money paid usuriously may be recovered. The rule is not changed by the present Usury Act. *Brown v. McIntosh*, 39 N. J. Law. 22.

**3478.** Notes given in 1876, for excess of interest over seven per cent. upon money loaned in 1873, upon a verbal contract to pay 18 per centum per annum, are without a legal consideration, and no recovery can be had thereon. *Jones v. Holcombe*, 60 Ga. 665.

**3479.** In an action upon a note valid upon its face, and calling for only legal interest, the burden of proving payment and usury is upon the defendant. *Lathrop v. Davenport*, 20 Kansas, 285.

**3480.** One who comes into a Court of Equity for relief against an usurious contract, will be compelled to pay the principal and legal interest; and if the debt is secured by mortgage, it will stand for the debt and legal interest. *Pickett, et al. v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346.

**3481.** Building societies are virtually exempted from the operations of the Usury Laws. In mortgages taken by a building society for advances to borrowing members, it is not necessary to express in the instrument how much of the interest reserved is a bonus in respect of the sum advanced, and how much for interest. *The Freehold Permanent Building and Saving Society v. Choate*, 18 Grant Ontario, Chancery, 412.



**3482.** It is not necessary for a party seeking equitable relief from a usurious contract to show that he has tendered legal interest in addition to the principal of his debt. *Morris v. Miller, et al.*, 46 Iowa, 84.

**3483.** Usury may not only be pleaded as a defence, but also may be made the basis of original and affirmative relief. *Ibid.*

**3484.** M. purchased at judicial sale the property of H. Before the time for redemption expired, B. redeemed it, paying \$1,485 for the redemption, and then entered into an agreement with H., whereby, upon the payment to him of \$2,000, he should convey the property to H. *Held*, that the transaction between B. and H. constituted a loan, and that the loan is usurious. *Wormley v. Hamburg, et al.*, 46 Iowa, 144.

**3485.** The defence of usury cannot be set up against a negotiable promissory note while in the hands of an innocent indorsee, who purchased the same before maturity. *Gross v. Funk*, 20 Kansas, 653.

**3486.** Where, on a loan of money, the borrower agreed to repay, at a certain time, the amount of the money loaned, with lawful interest, and further agreed, upon default made in such payment, to perfect and surrender to the lender certain shares of stock pledged as collateral security for the loan, *held*, not to be usurious. *Ramsay v. Morrison*, 39 N. J. Law, 591.

**3487.** A sale of cotton at a price beyond its real value to one who resold for a less price, will not be denounced as an usurious transaction, unless there was a proposition to the seller to borrow, and negotiations terminating in a sale; or a knowledge of the borrower's necessities, and that he was purchasing at an exorbitant price, to relieve himself by a subsequent sale at a less price; or something showing a design on the part of the vendee to borrow and the vendor to loan money, under device of sale, whereby, under guise of excess of price, usurious interest was reserved. If design existed, it is immaterial in what shape it is veiled. *Barr v. Collier*, 54 Ala. 39.

**3488.** When a sale is made under a mortgage, whether the contract was usurious or not, is immaterial in an inquiry as to the validity of the sale; usury affects only the distribution of the proceeds, not the sale itself. If more than legal interest has been extorted by the mortgagee, the Court, in distributing the proceeds, may direct it to be withheld or refused. *Carroll v. Kershner*, 47 Md. 262.

**3489.** Under the Act of February 18, 1848 (S. and C. 744), all payments of usurious interest are to be taken as payments on account of the principal; and where the sureties on a negotiable promissory note, given by way of removal for money previously loaned, have been compelled to sell such note to an indorsee, who purchased the same *bona fide* before due, they may, under the statute, recover from the payee the amount of usury exacted by him from their principal, which they have been so compelled to pay to the holder by reason of the indorsement of the note. *Kock v. Block*, 29 Ohio, 565.

**3490.** The right to borrow money within the prescribed limits, and issue certificates therefor, bearing interest, is conferred by the borough law of the State; and the fact that the bond in this case called for eight per cent. interest, did not invalidate it, and it was only void for

the excess over the legal rate of interest. *Parkinson v. City of Parker*, 85 Penn. St. 313.

**3491.** A confession of judgment, made for the purpose of aiding in the violation of the Usury Law, will be regarded, as between the parties to the usurious contract, void as to the amount in excess of the sum the judgment creditor may lawfully recover. *Mullen, et al. v. Russell, et al.*, 46 Iowa, 386.

**3492.** A provision in a note requiring the interest to be paid quarterly, and stipulating that the interest, if not paid when due, shall bear interest at the rate of 10 per cent., does not render the contract usurious. *Ragan v. Day, et al.*, 46 Iowa, 239.

**3493.** A party residing in one State who goes into another State and there makes an agreement with a citizen of that State for a loan, lawful by its laws, but usurious under the laws of the borrower's State, cannot render his obligation void by making it payable in his own State. Nor does the fact that the obligation is executed in the latter State, and sent to the borrower by mail, require that it should be governed by the usury laws of the State where it was signed. *Wayne Co. Sav'gs Bank v. Low*, 81 N. Y. 566.

**3494.** In pursuance of an agreement made in Pennsylvania between plaintiff, a corporation organized and doing business in that State, and defendant, a citizen of New York, for the renewal of a promissory note held by the former, made by the latter, plaintiff mailed to defendant a promissory note for him to execute and return. This note was dated and executed by defendant at M. in this State, and was made payable there; it was returned to plaintiff by mail, with a check to pay the discount. The discount was at a rate lawful in Pennsylvania, but greater than lawful interest in this State. In an action on the note, *held*, that as the note was executed to be used in Pennsylvania, the law of that State must control, and that, therefore, the note was not usurious. *Wayne Co. Sav'gs Bank v. Low*, 81 N. Y. 566.

**3495.** In an action upon a promissory note, wherein the defence was usury, defendant testified that at the time of giving it he paid interest on the amount at the rate of one dollar per day for \$1,000; that it was given in renewal of other notes, on which the same rate of interest was paid; that the same rate was paid on the note given for the original loan, and that all the notes were received by, and interest paid to the clerks of plaintiff's testator, at his banking-house. It was not claimed that any part of the interest was paid to the clerks as commissions for their services, or for their benefit in any way, or otherwise than as clerks for the deceased. One of said clerks testified to payments as sworn to by defendant, and that he, witness, made some of the loans by direction of the deceased. *Held*, that the evidence justified a finding of usury. *Pratt v. Elkins*, 80 N. Y. 198.

**3496.** The Usury Law of 1862 is constitutional, and a contract made in violation of it will not be enforced. *State v. Chapman*, 5 Oregon, 432.

**3497.** The forfeiture of an usurious debt to the School Fund carries with it the security for the payment of the debt, for the reason that the security is an incident of the debt, and is tainted with the usury. *Ibid.*

**3498.** The knowingly taking or receiving, by a national bank,



of a greater rate of interest than is allowed by the State in which the bank is located, is, under the Act of Congress, usurious, and the bank incurs the forfeiture of the entire interest. The limitation of two years, contained in the Act, applies alone to proceedings for the recovery of the forfeiture provided for, and not to the defence of usury; the State Courts have jurisdiction of questions arising under the act. *Pickett, et al. v. Merchants' Nat. Bank of Memphis, et al.*, 32 Ark. 346.

**3499.** That although the Code provides the mode and manner in which a defendant may plead usury, its provisions do not in any manner deprive a party of existing remedies for relief against the payment of illegal interest, even though he may have failed to avail himself of the plea. Such being the law, there is no reason why a party may not except to the confirmation of an award on the ground of usury, even though no such defence was made before the arbitrator. *Woods v. Matchett*, 47 Md. 390.

**3500.** Where a loan is effected through an agent, the fact that the amount received by the borrower is less than that advanced by the principal, and specified in the note, does not render it usurious, in the absence of proof that the agent acted for the lender in retaining the sum which is deducted from the note. *Wyllis v. Ault, et al.*, 45 Iowa, 46.

**3501.** A separate note, given by the borrower to the agent for his services in negotiating the loan, will not be tainted with usury where the agent acts for the borrower, and not the lender. *Ibid.*

**3502.** When usurious interest is carried into a general account, and made part of a sum found due on final settlement, for which a note is executed, it taints the entire contract with usury; and it matters not that the usurious interest was charged with the tacit consent of the debtor in stating monthly accounts, or by a note substituted for one previously executed. *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346.

**3503.** R. S., of 1857, c. 45, relating to usury, was unconditionally repealed by St. of 1870, c. 169, which expressly excepted by the general Repealing Act, c. 174, St. 1870. To a promissory note in which is reserved, and on which was received, excessive interest, given May 13, 1857, while R. S. of 1841, c. 69, was in force, and sued upon August 5, 1874, after the unconditional repeal of R. S. 1857, c. 45, usury is no defence, and the maker of the note can claim no deductions for excessive interest reserved or paid. *Holmes v. French*, 68 Me. 525.

**3504.** The plea of usury is personal, and when a third party assumes the payment of a usurious debt, and gives the creditor an assurance of payment, he can neither dispute with the creditor the validity or the amount of the debt. The consideration passing from the debtor to the party undertaking to pay, is presumed to be adequate to sustain the undertaking; but where the amount of the liability is left for future ascertainment, and there are rights and interests reserved that can only be protected by the party who has contracted to pay the debt, or by the debtor himself, the rule is different, and the defence may be interposed by the third party. *Pickett, et al. v. Merchants' Nat. Bank*, 32 Ark. 346.

**3505.** J. C. who lived in Ohio, executed his single bill in Ohio,

payable to P., and pursuant to a former arrangement with S. C., the brother of J. C. P., took the single bill to Virginia where he and S. C. lived, and there S. C. signed the bill which was a joint and several obligation, as surety for his brother. The single bill did not specify where it was to be paid, and on its face was to bear interest at eight per cent. per annum from date. By the laws of Ohio the interest was lawful, but by the law then in force in Virginia, December, 1858, a greater rate of interest than six per cent. per annum rendered the contract void. S. C. died, the single bill still being unpaid; suit was brought in Hancock County against the administrator of S. C. to recover the amount thereof; the administrator pleaded usury; the case was tried before the court, in lieu of a jury, and judgment rendered for the amount of the single bill, with eight per cent. interest. *Held*, that if the plea of usury could not have availed the principal obligor in the single bill it would not have been of any avail to the surety, as the surety could not attack the validity of the contract, if the principal could not. That the single bill being executed by the principal in Ohio, and the surrounding circumstances showing it was to be paid there, S. C. in signing it in Virginia as surety, ratified it as an Ohio contract. It being an Ohio contract and valid under the usury laws of that State, the surety although he signed it in Virginia, could not avail himself of a plea of usury thereto. *Pugh v. Cameron Adm'r*, 11 W. Va. 523.

**3506.** It is a good defence to an action by a payee against the maker of a promissory note made in New York, payable "on demand with interest," that the payee received it as a substitute for a draft there drawn under an oral agreement, with his knowledge, for more than legal interest, and that the note itself was made under an oral agreement that he should receive the same interest upon it as that received in a certain other note which was usurious, and the latter note is admissible in evidence to show what that rate was. *Stanton v. Demervill*, 122 Mass. 495.

**3507.** The only question submitted upon the hearing was, whether the defence of usury is established. The mortgagor evidently paid a large commission in the negotiation of the loan of \$6,000, and it is probable that he paid a large one on the subsequent loan of \$8,000; but it does not appear that Mrs. S., the mortgagee, or B., her agent in making the loans, received or had any benefit from those commissions. The proof that she lent the whole of the \$8,000. The defence of usury is not established, and there will be a decree for the complainant accordingly. *Spring, Ex. v. Reed, et al.*, 28 N. J. Eq. 345.

**3508.** The answering defendants, by their answer, set up the defence of usury, and they insist that the mortgage in suit is so affected thereby that not only is the whole of the interest forfeited, but the bill must be dismissed, because no interest has ever been recoverable on the mortgage, in consequence of the usury, and therefore, there has been no default; and if no default, the principal is not due, and will not be due until the 1st of July, 1878. The mortgage in suit was given to secure the payment of three several and distinct loans by the mortgagee to the mortgagor, H. On the first of these a premium was taken, but none on either of the others. The second and third loans were neither of them usurious. The first was—to that the forfeiture



should be confined. *Crippen v. Heermance*, 9 Paige, 211. No interest is recoverable in respect to the amount of that mortgage, and the interest received by the mortgagee on the \$500 premium must, with the premium be deducted. *Bedle v. Wardell*, 10 C. E. Gr. 349. Interest is recoverable on the rest of the amount of the principal, that is, on \$2,500. According to the bill, no interest has been paid since the 1st of January, 1875, and the complainant elected that the principal should at once become due, by reason of the default. If, in fact, no interest whatever were recoverable on the mortgage, that fact would not relieve the defendants from the consequences of the default. *The default would still exist, notwithstanding* the fact that the interest is not recoverable by suit. The principal of the mortgage, less the amount of the premium is due. *Mahn v. Hussey*, 28 N. J. Eq. 546.

**3509.** The defence, which the petitioner asks an opportunity to set up, is usury. She alleges, in her petition, that the mortgages of the complainant were made in New York upon usurious contracts, and that they are therefore, under the law of that State, absolutely void, and should be decreed to be so in this State. In order to entitle her to the relief which she seeks on this petition she must show that she has an equitable and meritorious defence. *Hoover v. Corning, ubi supra*. The defence of usury under existing law of this State is not unconscientious. *Conover v. Van Mater*, 3 C. E. Gr. 481; *Wagner v. Blanchet*, 12 C. E. Gr. 356. The defence which the petitioner asks leave to interpose against the complainant's mortgage is so. She cannot, therefore, have leave to set it up. *Corning v. Ludlum*, 28 N. J. Eq. 398.

**3510.** Wren borrowed money at usurious interest and gave a bond for its payment, on which judgment was entered. He was afterwards adjudged a bankrupt, and his land sold by the assignee subject to the judgment. *Held*, that the purchaser could not have the judgment reduced by the amount of the usury. In the distribution of a fund judgment creditors may attack a judgment collaterally for fraud on them, but not because it is a fraud on the debtor. Payment of usury is not necessarily fraudulent as to creditors. Whenever the usurious contract is intended to defraud creditors, or when the circumstances of the debtor are known to be such, that it can be reasonably presumed that this will be the natural effect, creditors have the right to postpone the excess of interest. *Miner's Trust Co. Bank v. Roseberry*, 81 Penn. St. 309.

**3511.** Van Auken gave a note to Everett for \$3,340, judgment was entered on it; Everett assigned \$2,500 of it to Dunning; on affidavit of Van Auken the judgment was opened and he let into a defence. On the trial he offered to prove that Dunning lent him \$2,500 in New York at a rate of interest usurious by the laws of that State; that Van Auken procured the assignment of the judgment as collateral security for the loan, it having been paid by the money borrowed from Dunning. *Held*, that this would be a defence, Dunning was entitled to recover the amount lent and legal interest. The offer not being to show that the contract was void for usury by the laws of New York, the presumption was that they were the same as in Pennsylvania, and the contract was to be treated as void only for the excess of interest. *Van Auken v. Dunning*, 81 Penn. St. 464.

**3512.** Where a note which is tainted with usury has been transferred to another without notice, and even where the transferee is not proven to have known of the taint, for a valuable consideration without indorsement and without representation as to legality, no warranty against it will be implied, and an action cannot be sustained against him for loss sustained by the purchaser by reason of the defect; a scienter is essential to establish an implied warranty as to the validity of the note. A transfer of this kind implies simply a warranty of title and that the note is genuine. The Court held the question whether an action will lie for the loss sustained by the plaintiff by reason of the note being usurious, and the recovery of the amount thereof thereby defeated, has never arisen under the precise circumstances presented in this case, and demands an examination of the principle applicable to the contract entered into upon the sale of paper of this description, and of the authorities bearing upon the subject. The rule is well settled that generally one who transfers paper by delivery only, incurs none of the liabilities which attach to an indorser, for the reason that the irresistible inference is, that if he transfers it and it is received without his indorsement, that such liabilities did not enter into the bargain or the intention of the parties. This rule, however, is not without exception, and the transferor of notes or bills by delivery warrants the genuineness of the signatures, and that the title is what it purports to be. If the paper is forged the transferee is liable upon the original consideration which has never been extinguished by the sale. So also, it is laid down by that vendor without indorsement warrants that the paper is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability to contract, and the assignment of a bill or note for a valuable consideration raises an implied warranty that the assignor has done nothing, and will do nothing to prevent the assignee from collecting it. The reason given as to forged paper is that it is nothing, and the one who has transferred it has transferred nothing, and is therefore liable. In *Webb v. Odell*, 49 N. Y. 583, a recovery for the purchase price was upheld where notes were sold for less than their face, upon a representation that they were business papers, when, in fact, they were accommodation notes, and thus usurious and void in the hands of the vendee. The decision is placed upon the ground that the thing sold differed in substance from what the purchaser was led by the vendee to believe he was buying, and the difference was so substantial and essential in its character as to amount to a failure of consideration. The representation that the notes were business paper was an important fact, and hence the decision does not exactly cover a case where the party transferring had no knowledge of the true character of the paper. In *Ross v. Terry*, 63 N. Y. 613, the defendant sold a bond and mortgage to the plaintiff, which was usurious and void. The defendant was personally concerned in the making of them, and in the unlawful acts which vitiated them, and it was held that there was an implied warranty of the validity of the securities. In *Luke v. Smith*, 7 Abb. N. S. 106, the defendants, who sold a usurious note to the plaintiff, were held liable upon an implied warranty by defendants on the sale of the note, that there was no legal defence to an action upon it, but it appeared that the defendants were privy to the



consideration of the note, and the facts and circumstances under which it was given and transferred. In *Hoe v. Sanborn*, 21 N. Y. 552, Selden J., lays down the rule "that whenever an article sold has some latent defect, which is known to the seller, and not to the purchaser, the former is liable for this defect if he fails to discover his knowledge on the subject at the time of the sale." There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note. To uphold such a doctrine would be an innovation upon a settled principal of law and the establishing of a new and different rule from that which has governed the sale and transfer of this species of property for a long period of time. *Littaner v. Goldman*, 72 N. Y. App. 506.

**3513.** When, at the time of an agreement for a loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute; to increase or alter it, a special agreement is necessary, and where the defence of usury is interposed, the burden of showing that such an agreement was made is upon the defendant. *Guggenheimer v. Gieszler*, 81 N. Y. 293.

**3514.** G., being indebted to S. upon notes past due, amounting to \$172.45, which were in the hands of R., an attorney, for collection, it was agreed that S. should loan to the former \$1,500. Nothing was said as to the rate of interest. G. was to pay the attorney's fees. The parties thereafter met at the office of R., and without any words or parley a bond and mortgage were executed and delivered by G. to S., as security for the loan. A statement showing the amount due on the notes, a receipted bill of R., as attorney, made out to G., and a check for the balance of the \$1,500, after deducting these two items, were handed to G.; one item of R.'s bill was, "commission for obtaining loan, \$150." There was no foundation for this charge, and it was intended for the benefit of S., was never, in fact, paid to R., but retained by S. G. questioned the correctness of this charge. S. replied it was cheap enough, and he could do no better. In an action to foreclose the mortgage, *held*, that these facts did not sustain a defence of usury, as there was no agreement or intent on the part of G. to pay usury; that under the agreement for the loan, S. was entitled simply to lawful interest. G. was under no obligation to allow any of the loan to be retained to pay the \$150, but was entitled to recover that amount. *Guggenheimer v. Gieszler*, 81 N. Y. 293.

**3515.** It seems that G. might claim that the recovery should include only the amount actually received by him, and the attorney's fees allowed by him, deducting the item of \$150. *Guggenheimer v. Gieszler*, 81 N. Y. 293.

**3516.** The note in suit was without interest; it was transferred to plaintiff, together with twelve other notes which were business paper, at the same time and as one transaction, at a discount from the aggregate amount of the notes greater than legal interest. There was evidence tending to show that there was a difference in the value of the notes, some being poor and considered worth but little, while that of the defendant was good, and it was talked that a greater discount should be made upon the former. *Held*, that the inference was proper that

plaintiff did not deduct from defendant's note at the same rate as from the others; and that as there were no facts from which the referee could say, with the needed legal precision, what was the rate, he could not say it was greater than the lawful rate; and that, therefore, a finding that there was no usury was justified. *Bayliss v. Cockcroft*, 81 N. Y. 363.

**3517.** In an action to foreclose a mortgage for \$2,500, the defence was usury. The court found that the mortgage and accompanying bond were executed to one H., not as a security, but only for the purpose of being sold to plaintiff at a discount; that they were so sold and were usurious. Defendant's evidence was to the effect that F., the mortgagor, before the execution of the bond and mortgage, applied to plaintiff for a loan of \$2,500, that plaintiff directed him to go and make a mortgage to somebody else, that he could buy it of them, and would loan the money. No terms of loan were stated, and no property specified to be mortgaged. H. held judgments against F. to the amount of about \$900. The bond and mortgage were executed to secure this indebtedness. H. also advanced thereon \$320, and it was understood that the balance realized on sale of the securities after paying the judgments and the money advanced was to be paid to F. They were offered to other parties before plaintiff purchased, and were sold to him at a discount. *Held*, that the evidence did not sustain the finding; that the defence of usury was not made out, but only as to part of the sum secured a failure or want of consideration; that the bond and mortgage were valid securities in the hands of H. for the amount of his judgments and the sum advanced by him, and to that extent, at least, plaintiff, standing in the place of H., could enforce them. *Sickles v. Flanagan*, 79 N. Y. 224.

**3518.** Although a loan of money may be usurious and the contract to return it void, yet, in the absence of statutory enactment, it does not follow that the borrower, after he has once repaid the money, nor even that his assignee in bankruptcy, whose rights are in some respects greater than those his own, can recover the principal and illegal interest paid. Equity, however, in its discretion may enable either to get back whatever money the borrower has paid in excess of lawful interest. *Tiffany v. Boatman's Institution*, 18 Wall. U. S. 375



## VENDOR.

**3519.** Vendor who has guaranteed a good title to the property he has sold cannot collect the price of the sale from the vendee until he has made the title good. *Wamsley v. Hunter*, 29 La. 628.

**3520.** The vendor of real estate has a lien upon the property sold for the unpaid purchase money, independent of the existence of a lien evidenced by a title bond or mortgage. *Rosler v. Hale*, 10 Iowa, 470; *Malony v. Fortune*, 14 Iowa, 417; *Harlan v. Sigler*, Morris, 39; *Griffey v. Payne*, Morris, 68; *Jordan v. Wimer*, 45 Iowa, 65, Seevers, Ch. J., dissenting.

**3521.** If the vendor of land retains the legal title until payment is made, or if he creates an express lien in his deed to secure the purchase money, an assignment of the notes given therefor carries with it the security to the same extent as it existed for the benefit of the vendor. *Moore v. Lackey*, 53 Miss. 85.

**3522.** A note for the purchase money of land, payable in Mississippi certificates of indebtedness, is secured by the vendor's equitable lien the same as if payable in money. *Deason v. Taylor*, 53 Miss. 697.

**3523.** A person who, having discovered a flaw in a title to land, purchases the title for speculation, with a view to ousting the possessor, who claims to be the real owner, is not a *bona fide* purchaser. *Wanner v. Sisson*, 29 N. J. 141.

**3524.** Vendor of lands, who had taken a note therefor, which he had indorsed and negotiated, was held liable without notice on the ground that he had retained the title of the land as security. *Develing v. Ferris*, 18 Ohio, 170.

**3525.** Title does not vest till the delivery of the deed. *Heffron v. Flanigan*, 37 Mich. 274.

**3526.** Giving a receipt or taking a note, with security, from the purchaser, or taking a note of a third party, specifying in either case it is for the purchase money, will not, while the title remains in the vendor, be an extinguishment of the vendor's lien unless the purchase money has been actually paid. *Dunlap, ex'r v. Shanklin*, 10 West Virginia Reports, 662.

**3527.** As soon as an order for goods is accepted by the vendor, the contract is complete without further notice to the vendee; and such contract is fully performed on the part of the vendor by the delivery of the goods in good condition to the proper carrier. A delivery to a carrier designated by the vendee is of the same legal effect as a delivery to the vendee himself; if no particular route or carrier is indicated by the vendee, it is the duty of the vendor to ship the goods ordered in a reasonable course of transit. *Ober v. Smith*, 78 N. C. 313.

**3528.** To enable vendor to recover the purchase money, he must aver performance on the day named on his own part or an offer to perform. *Bank of Columbia v. Hagner*, 1 Peter, U. S. 455.

**3529.** Vendee of stock who rescinds contract for fraud is not bound to receive certificate left on deposit for him, and tender it to vendor before bringing action for the purchase money. *Pence v. Langdon*, 99 U. S. 578.

**3530.** Purchaser who has enjoyed property for ten years cannot

invoke equity to stay judgment for price on ground of illegality of contract. *Truly v. Wanzer*, 5 How. U. S. 141.

**3531.** Each party must take care not to say or do anything tending to impose on the other. Doctrine of Pothier as to respective obligations of vendor and vendee in this respect. *Laidlaw v. Organ*, 2 Wheat. U. S. 178.

**3532.** For a refusal on the part of the vendee to perform a contract for the purchase of real estate the vendor has two remedies, one to recover damages, the other for specific performance. *Smyth v. Sturges*, 108 N. Y. 495.

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### WAREHOUSE RECEIPT.

**3533.** A warehouseman's receipt for goods not in his warehouse at the time of the execution and delivery of the receipt, although he was the owner, *did not pass any right or title* to the holder of such receipt so as to affect innocent third parties. *But after removing the goods to his warehouse*, the warehouseman might, by a subsequent stipulation or ratification of his original contract, before the rights of others intervened, again pledge the property to secure the liability, for the security of which the original receipts were given. *The new receipts took effect at the time of their execution and delivery*, although they were dated back to correspond with the dates of the original receipts. *Cochran & Fulton v. Ripy, Hardie & Co., et al.*, 13 Bush, Ky. 495.

**3534.** A party having property stored in a warehouse may sell or dispose of the same in the absence of a warehouse receipt, and this right is not taken from him by the statute. The character of symbol that would in construction of law pass the possession to one making an absolute purchase would pass the possession to a party holding the property in pledge to secure the payment of a debt. *Ibid.* Warehousemen's receipts are negotiable and transferable by indorsement in blank, or by special indorsement, the indorsers being liable as are indorsers of bills of exchange. *Ibid.*

**3535.** No one can obtain the property but the holder of the receipt, unless he produces the written consent of the holder as well as the receipt itself; and as to property owned by the warehouseman, for which he gives a receipt, he can assert no claim or set-off as against the holder, unless the receipt on its face shows such right to exist. *Ibid.*

**3536.** The right to pledge or pawn goods as a security for the payment of a debt existed independently of the statute, and was made to rest upon the doctrine of the common law. It is a bailment of personal property only, and the right in the bailee or pledgee is never consummated until the latter has possession of the property. *Ibid.*



## WARRANTY.

**3537.** A., by a contract in writing, pledged to B. certain tobacco, reciting that it was A.'s "own property, and free from all incumbrances and all of the crop" of a certain year. B. borrowed money of C., and delivered the tobacco to him and gave him an assignment of all his "right, title and interest in and under the contract, together with all the property therein mentioned." *Held*, that there was no implied warranty of title to the tobacco or of its quality, between B. and C. *National Bank of Northampton v. Mass. Loan and Trust Co.*, 123 Mass. 330.

**3538.** Breach of warranty may be set up as a defence without returning the goods, unless the contract of sale expressly requires their return. The omission to return them only affects the amount of damages recoverable. Where goods were sold with warranty, and the defence to an action for part of their price was grounded on a breach thereof, an inquiry as to whether part of the goods were sound that had been returned as unsound, was relevant on the cross-examination of the plaintiff, who had testified as to the contract and its performance. *Hull v. Belknap, et al.*, 37 Mich. 179.

**3539.** Warranty implied on the part of the Vendor of a Bond or other Security, that it is a valid and subsisting security for the amount expressed. Defendant sold and assigned to plaintiff a bond and mortgage which were usurious and void. Defendant was personally concerned in the making of them and in the unlawful acts which vitiated them. *Held*, that there was an implied warranty on the part of defendant of the validity of the bond and mortgage, for the breach of which he was liable. Defendant executed a warranty of the validity of the mortgage. *Held*, that as the bond was the principal debt upon which the mortgage was dependent, if the bond was invalid the mortgage also; and therefore that the warranty was, in effect, that the bond as well as the mortgage was valid. *Ross, Respt. v. Terry, Applt.*, N. Y. Reports, 18 Sickels, 613.

**3540.** Where L. purchased of R. a certain number of barrels of rosin, under the following contract, viz: "Received of L. \$700 in part payment of 500 barrels of strained rosin, to be delivered, etc.," and thereupon, at the place of delivery, L. examined and selected the number of barrels purchased from a lot of barrels largely in excess of the amount purchased; and the barrels so selected afterwards proved in a great measure not to be "strained rosin:" it was *held*, that the agreement of R. to deliver, etc., amounted to a warranty on his part, that the rosin received by L. should be strained rosin. In such case, the fact that L. had an opportunity to inspect the rosin before or when it was delivered, and did in fact select the particular barrels purchased, did not amount to a waiver of the warranty that they should be of the specific description. Where goods are warranted to come within a specific description, the vendee is entitled, although he does not return them to the vendor or give notice of their failure to come within the description warranted, to bring an action for breach of warranty. *Lewis v. Rountree*, 78 N. C. 323.

**3541.** Where certain county warrants were sold by a citizen of

Iowa, where they were issued, to a citizen of another State, with a guaranty that they were "genuine and regularly issued,"—*Held*, that the former thereby undertook that they were not, in suit brought against the county, subject to any defence founded upon a want of legal form in the signature or seals; and that, the absence of the county seals being a breach of the warranty, the vendee, without returning or tendering the warrants, was entitled to recover of the vendor the damages which he had sustained by such breach. *Smeltzer v. White*, 92 U. S. 390.

**3542.** Where there is a warranty of quality on sale of goods the vendee may receive and retain the goods and recoup or recover damages for any breach of the warranty, or he may return the goods and plead a rescission of the contract as a defence to an action for their price. *Norton v. Dreyfuss*, 106 N. Y. 90.

**3543.** It seems, however, the purchaser may not in the same action sustain a claim of a return of the goods and rescission of the contract, and also for damages for breach of the warranty. *Ibid*.

**3544.** Under authority of acts of the legislature of Kansas, the city of Topeka issued certain bonds payable to a party named, or bearer. They became the property of a bank, which put them upon the market, and disposed of them. This court decided that the legislature had no power to pass the acts, and that the bonds were void, the purchasers brought suit on the ground of failure of consideration to recover the amount paid for them. *Held*, that as the bank gave no warranty, it cannot be charged with a liability it did not assume. *Otis, et al. v. Cullon, Receiver*, 92 U. S. 447.

**3545.** The vendor of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and are not forgeries. When there is no express stipulation, there is no liability beyond this. *Ibid*.

**3546.** The first section of the Act of Congress of 1870, ch. 59, establishes the legal rate of interest, in the District of Columbia, at six per cent. Section 2 permits parties to stipulate in writing for any rate not exceeding ten per cent. Section 3 forfeits the whole interest under any parol contract providing for a greater rate than six per cent. or written contract stipulating for more than ten per cent. Section 4 provides for the recovery of all the interest paid, when more has been exacted than allowed by the act, provided suit to recover the same be brought within one year after such payment. In an attachment brought, in Maryland, by K. against E., as a non-resident, E., among other pleas pleaded, was that of set-off; that the plaintiff was indebted to him for money paid the plaintiff on account of usurious interest; and proved that he had paid the amount of the set-off to the plaintiff, for usurious interest upon loans made in the District of Columbia, where both parties resided. Said payments were made more than one year, but most of them within three years before the plea filed. *Held*, (1) That a prayer offered by the defendant asserting his right to recover the excess above six per cent. paid by him, but failing to submit to the jury to find that the loan was upon a verbal contract only, was bad. (2) That the right to recover for the illegal interest, being given by the Act of Congress, must be subject to the terms prescribed by that Act, as to the time within which the right must be asserted.



(3) That the sums paid by the defendant in the District of Columbia, more than one year before the account in bar was filed, could not be abated from the plaintiff's claim. *Eastwood v. Kennedy*, 44 Md. 563.

3547. A warranty of title is implied in a contract of exchange, the same as in a contract of sale. *Patee v. Pelton*, 48 Vt. 182.

3548. When goods have been sold with a warranty of quality, and those delivered, though inferior to the stipulation, are retained by the vendee, the latter may either pay the price, and have his action for the breach of warranty, or he may *recoup* his damages in the vendor's action for the price. *Smith, et al. v. Mayer, et al.*, 3 Colo. 207.

3549. If the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer may refuse to accept the goods, and return them; and while in his charge, or possession, he is certainly not liable for injury to the goods, resulting from no want of due care on his part. *Bigger v. Bovard*, 20 Kansas, 204.

3550. A vendor impliedly warrants goods sold by him, without any opportunity of inspection on the part of the buyer, to be of a merchantable quality, and reasonably fit for the purpose intended; and if, when the goods are delivered to the buyer, they are unmerchantable and unfit for use, the buyer may return them, without unnecessary delay, and rescind the contract. *Ibid.*

3551. Where the evidence showed, without conflict, that a written warranty was given by vendor to vendee, the latter could not recover for the breach of an additional parol warranty. *Shepherd v. Gilroy, et al.*, 46 Iowa, 193.

3552. The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. *Stott, et al. v. Rutherford*, 92 U. S. 107.

3553. Warrantor is bound by printed signature which he adopts as his, as fully as if it were in his handwriting. *Grieb v. Cole*, 60 Mich. 397.

## WRITTEN INSTRUMENTS.

3554. Courts must interpret written instruments, but they follow the meaning attributed to the terms by those whose custom it is to use them. Where a contract may have two interpretations, courts will follow that which the parties have put upon it and cited upon. *Gass' et al., appeal*, 73 Penn. St. 39.

3555. An agreement for the sale of personal property at a price not less than fifty dollars, is void under our statute of frauds, unless the same, or some note or memorandum thereof expressing a consideration, be in writing, and subscribed by the party to be charged. A promise made by one party without a corresponding obligation or promise by the other party is void. *Corbitt v. Salem Gaslight Co.*, 6 Oregon, 407.

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# ABBREVIATIONS EMPLOYED IN CITING LAW REPORTS.

Abb. Adm. (U. S.) . . . . .	Abbott's Admiralty, U. S. District, Southern Dist. of N. Y.
Abb. (U. S.) . . . . .	Abbott's U. S. Circuit and District Courts.
Abb. Pr. (N. Y.) . . . . .	Abbott's Practice, Various Cts.
Abb. N. C. (N. Y.) . . . . .	Abbott's New Cases, Various Cts.
Abb. Pr. N. S. (N. Y.) . . . . .	Abbott's Practice, New Series, Various Cts.
Abb. App. Déc. (N. Y.) . . . . .	Abbott's New York Court of Appeals.
Add. (Pa.) . . . . .	Addison's Penn. County Court, and Court of Errors.
Aik. (Vt.) . . . . .	Aiken, Vt. Supreme Court.
A. K. Marsh. (Ky.) . . . . .	A. K. Marshall's Court of Appeals.
Ala. N. S. (Ala.) . . . . .	Alabama Sup. Ct., New Series.
Ala. Sel. Cas. (Ala.) . . . . .	Alabama Select Cases, Ala. Sup. Ct.
Alden, (Penn.) . . . . .	Alden's Condensed Reports.
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- Rich. Ch. (S. C.) . . . . . Richardson's Courts of Appeals and Errors in Chancery.
- Rich. N. C. (S. C.) . . . . . Richardson's New Serious. (Distinction of Law and Equity has been abolished).
- Riley, (S. C.) . . . . . Rileys' S. C. Court of Appeals.
- Riley, L. (S. C.) . . . . . Riley's Court of Appeals in Law.
- R. M. Charl. (Ga.) . . . . . R. M. Charlton's Ga. Superior Court.
- Rob. (La.) . . . . . Robinson's La. Supreme Court.
- Rob. (Va.) . . . . . Robinson's Va. General Court.
- Robb, Pt. Cas. (U. S.) . . . . . Robb's Patent Cases Supreme and Circuit Courts.
- Bobt. (N. Y.) . . . . . Robertson's N. Y. Supreme Court.
- Rog. Rec. (N. Y.) . . . . . Roger's New York City Hall Recorder.
- Root, (Conn.) . . . . . Root's Conn. Court of Errors.
- Rowell, Vt. . . . .
- Sandf. (N. Y.) . . . . . Sanford's N. Y. Supreme Court.
- Sandf. Ch. (N. Y.) . . . . . Sanford's N. Y. Court of Chancery.
- Saw. C. Ct. (U. S.) . . . . . Sawyer's U. S. IX. Circuit Court.
- Sax. Ch. (N. J.) . . . . . Saxton's New Jersey Court of Chancery.
- Scam. (Ill.) . . . . . Scammon's Ill. Supreme Court.
- Sel. Cas. . . . . Select Cases.
- Serg. & R. (Pa.) . . . . . Sergeant & Rowle's Penn. Supreme Court.
- Smed. & M. (Miss.) . . . . . Smedes & Marshall's Superior Court of Chancery.
- Smed. & M. L. (Miss.) . . . . . Smedes & Marshall's Superior Court in Law.
- Smith, E. D. (N. Y.) . . . . . E. D. Smith's, N. Y. Court of Common Pleas.
- Smith, (Ind.) . . . . . Smith's Indiana Supreme Court.
- Smith, Cond. (Ala.) . . . . . Smith's Condensed Ala. Reports.
- Sneed, (Ky.) . . . . . Sneed's Decisions of Court of Appeal.
- Sneed, (Tenn.) . . . . . Sneed's Tenn. Supreme Court.
- South. (N. J.) . . . . . Southard's N. J. Supreme Court.
- Spears, (S. C.) . . . . . Spear's S. C. Ct. of Appeals and Errors.
- Spears, Eq. (S. C.) . . . . . Spear's S. C. Chancery Reports.
- Spem. (N. J.) . . . . . Spencer's N. J. Supreme Court.
- Sprague, Dist. (U. S.) . . . . . Sprague's Decisions U. S. District Ct. of Mass.
- Stew. (Ala.) . . . . . Stewart's Ala. Supreme Court Reports.
- Stew. & P. (Ala.) . . . . . Stewart & Porter's Ala. Supreme Court.
- Stock. (N. J.) . . . . . Stockton's Courts of Chancery, Errors and Appeals.
- Story, C. Ct. (U. S.) . . . . . Story's U. S. First Circuit Court.
- Strobh. (S. C.) . . . . . Strobhart's S. C. Court of Appeals and Errors at Law.
- Strobh. Eq. (S. C.) . . . . . Strobhart's S. C. Court of Appeals and Errors and Equity.
- Sumn. C. Ct. (U. S.) . . . . . Sumner's U. S. First Circuit Court.
- Sup. Ct. . . . . Supreme Court Reports.
- Swan, (Tenn.) . . . . . Swan's Tenn. Supreme Court Reports.
- Sweeney, (N. Y.) . . . . . Sweeney's N. Y. City Superior Court Reports.
- Taney, Dec. (U. S.) . . . . . Taney's Decisions IV. U. S. Circuit Court.
- Tapp. (Ohio) . . . . . Tappan's Ohio Courts of Common Pleas.
- Tayl. (N. C.) . . . . . Taylor's N. C. Superior Courts of Law and Equity.

Tenn. (Tenn.) . . . . .	Tennessee General Reports.
Tenn. Cooper. (Tenn.) . . . . .	Tennessee Chancery Reports.
Tenn. (Tenn.) . . . . .	Tennessee Reports.
Term. Rpts. (N. C.) . . . . .	Taylor's N. C. Supreme Court Term Reports.
Tex. (Tex.) . . . . .	Texas Supreme Court Reports.
Tex. Ct. App. (Tex.) . . . . .	Texas Court of Appeals Reports.
Thach. Cr. Cas. (Mass.) . . . . .	Thacher's Mass. Criminal Cases, Boston.
Thomp. & C. (N. C.) . . . . .	Thompson & Cook's N. Y. Supreme Court.
Thomp. Cas. (Tenn.) . . . . .	Thompson's Tennessee Cases.
Treadw. Const. (S. C.) . . . . .	Treadway's S. C. Constitutional Court.
Tuck. Sur. (N. Y.) . . . . .	Tucker's N. Y. Surrogate's Court.
T. U. P. Charl't. (Ga.) . . . . .	T. U. P. Charlton's Ga. Supreme Court.
Tyler, (Vt.) . . . . .	Tyler's Vermont Supreme Court Reports.
Utah Ter. (Ut. T.) . . . . .	Utah Territory Court Reports.
United States . . . . .	Supreme Court Reports.
Va. Cas. (Va.) . . . . .	Virginia Cases of General Court.
Van Ness, (U. S.) . . . . .	Van Ness' Prize Cases N. Y. District Court.
Vroom, (N. J.) . . . . .	Vroom's New Jersey Sup. Court Reports.
Vt. (Vt.) . . . . .	Vermont Supreme Court Reports.
Walk. Ch. (Mich.) . . . . .	Walker's Michigan High Court of Chancery.
Wall. (U. S. C. Ct.) . . . . .	Wallace's C. Ct. Third District.
Wall. (U. S. S. C.) . . . . .	Wallace's United States Supreme Court Reports.
Wall. Jr. (U. S.) . . . . .	Wallace Jr's. Third District Circuit Court.
Ware, (U. S.) . . . . .	Ware's District Court of Maine.
Ware, 2. ed. (U. S.) . . . . .	Ware's Second Edition District Ct. of Maine, including Davies in 2d Volume.
Wash. (U. S.) . . . . .	Washington's Third District Court.
Wash. T. (W. T.) . . . . .	Washington Territory Supreme Court.
Wash. (Va.) . . . . .	Washington's Virginia Court of Appeals.
Watts, (Penn.) . . . . .	Watt's Pennsylvania Supreme Court.
Watts & S. (Penn.) . . . . .	Watts & Sargeant's Penn. Supreme Court.
Wend. (N. Y.) . . . . .	Wendell's New York Supreme Court.
Wheat. (U. S.) . . . . .	Wheaton's U. S. Supreme Court.
Whart. (Penn.) . . . . .	Wharton's Penn. Supreme Court.
Wheel. (N. Y.) . . . . .	Wheeler's New York Criminal Reports.
Whit. Pt. R. (U. S.) . . . . .	Whitman's Patent Rep. of United States Cts.
Wil. (Ind.) . . . . .	Wilson's Indiana Superior Court.
Will. Cit. (Mass.) . . . . .	William's Citations from Quincy to 122 Mass.
Wins. Eq. (N. C.) . . . . .	Winston's North Caro. Supreme Court.
Wis. (State) . . . . .	Wisconsin Supreme Court Reports.
Wood, (U. S.) . . . . .	Wood's U. S. V. Circuit Court Reports.
Woodb. & M. (U. S.) . . . . .	Woodbury & Minot's First Circuit Ct. Reports.
Wright, (Ohio.) . . . . .	Wright's Ohio Sup. Ct. at Law and Equity.
W. Va. (State) . . . . .	West Virginia Sup. Court and Court of Errors.
Wythe, (Va.) . . . . .	Wythe's Virginia Chancery Reports.
Yates, Sel. Cas. (N. Y.) . . . . .	Yates' N. Y. Supreme Ct. and Ct. of Errors.
Yeates, (Penn.) . . . . .	Yeates' Penn. Supreme Court.
Yerg. (Tenn.) . . . . .	Yerger's Tennessee Sup. Court Reports.
Zab. (N. Y.) . . . . .	Zabiskie, N. J. Supreme and Court of Errors.

ABBREVIATIONS USED HEREIN IN REFERENCE TO ENGLISH REPORTS.

Ad. & E. . . . .	Adolphus & Ellis' Reports. K. B.
B. & A. . . . .	Barnewall & Anderson's Reports. K. B.
B. & Ad. . . . .	Barnewell & Adolphus' Reports. K. B.
B. & C. . . . .	Barnewell & Cresswell's Reports. K. B.
Barn. & C. . . . .	Barnewell & Cresswell's Reports. K. B.



B. R. . . . .	King's Bench Reports.
Bing. . . . .	Bingham's Reports, Common Pleas.
Beav. . . . .	Beavan's Reports, Rolls Court.
Bos. & Pul. . . . .	Bosanquet & Puller's Reports. C. P.
Bos. & Pul. N. R. . . . .	Bosanquet & Puller's New Reports. C. P.
Burr. . . . .	Burrow's Reports. K. B.
C. B. . . . .	Common Bench Reports.
C. C. R. . . . .	Common Cases, Reserved.
Ch. . . . .	Chancery Reports.
Camp. N. P. . . . .	Campbell's Reports, Nisi Prius.
Cary, . . . . .	Cary's Chancery Reports.
C. P. . . . .	Common Pleas Reports.
C. L. R. . . . .	Common Law Reports.
Cl. & Fin. . . . .	Clarke & Finnely's Rpts. House of Lords.
C. P. D. . . . .	Common Pleas Division Reports.
Co. . . . .	Coke's Reports. K. B.
De G. F. & J. . . . .	De Gex, Fisher & Jones Chancery Reports.
De G. M. & G. . . . .	De Gex, Macnaghton & Gordon's Ch. R.
De G. & Sm. . . . .	De Gex & Smale's Chancery Reports.
Dunlop or D. . . . .	Dunlop, Bell & Murray's Court of Session Rpts.
El. & El. . . . .	Ellis & Ellis' Queen's Bench Reports.
East. . . . .	East's Reports of King's Bench.
H. L. . . . .	House of Lords Reports.
Hare, . . . . .	Hare's Chancery Reports.
K. B. . . . .	King's Bench Reports.
L. J. . . . .	Lower Journal Reports in all Courts.
Law Rep. C. P. D. . . . .	Common Pleas Division Reports.
L. R. . . . .	Law Review Reports in all Courts.
Law Rept. Ap. Ca. . . . .	Appeal Cases Reported.
L. T. . . . .	Law Times Reports in all cases.
Law Rep. Ch. D. . . . .	Chancery Division Reports.
L. T. N. S. . . . .	Law Times Reports, New Cases.
Ld. Raym. . . . .	Lord Raymon's Reports. K. B.
Macl. & R. . . . .	Maclean & Robinson's Scotch Reports.
Man. & Gr. . . . .	Manning & Granger's Reports. C. P.
M. & S. . . . .	Maule & Selwyn's Reports. K. B.
Moo. & R. . . . .	Moody & Robinson's Chancery Reports.
Myl. & Cr. . . . .	Mylne & Craig's Chancery Reports.
N. P. . . . .	Nisi Prius Reports.
N. R. . . . .	New Reports, Bosanquet & Puller. C. P.
N. S. . . . .	New Series Reports.
Q. B. . . . .	Queen's Bench Reports.
Ry. & M. . . . .	Ryan & Moody's Nisi Prius Reports.
T. R. . . . .	Term Reports, Durnford & East. K. B.
Taun. . . . .	Taunton's Reports. C. P.
Ves. Sen. . . . .	Vesey Sen. Chancery Reports.
Ves. Jr. . . . .	Vesey Jr. Chancery Reports.
W. R. . . . .	Weekly Reports in all courts.

ABBREVIATIONS USED IN REFERENCE TO CANADIAN REPORTS.

Ca. . . . .	Canada Reports.
Grant Ch. . . . .	Upper Canada, Ontario Chancery Reports.
K. B. . . . .	King's Bench Reports.
Low. Ca. . . . .	Lower Canada Reports.
Low. Ca. J. . . . .	Lower Canada Jurist.
Low. Ca. L. J. . . . .	Lower Canada Law Journal.
Ont. . . . .	Ontario Reports.
Pugs. N. B. . . . .	Pugsley's New Brunswick Reports.
Q. B. N. S. . . . .	Queen's Bench Reports, New Series.
R. de Leg. . . . .	Revue de Legislature Jurisprudence.
Sp. Ct. . . . .	Supreme Court Dominion Reports.
Up. Ca. Ch. . . . .	Upper Canada Chancery Reports.
Up. Ca. C. P. . . . .	Upper Canada Chancery Reports.
Up. Ca. N. S. . . . .	Upper Canada New Series. Q. B.

APPEAL CASES.

Up. Ca. . . . .	Appeal Cases, Upper Canada.
Law Rep. Q. B. D. . . . .	Queen's Bench Division Repts.
Law Rep. C. P. D. . . . .	Common Pleas Division Repts.
Law Rep. Ex. D. . . . .	Exchequer Divisions Repts.
Law Rep. Prob. D. . . . .	Probate Division Reports.

ABBREVIATIONS USED IN REFERENCE TO IRISH REPORTS.

I. R. C. L. . . . .	Irish Reports, Common Law Cases.
Ir. Law & Ch. . . . .	Irish Law & Equity Repts. New Series.



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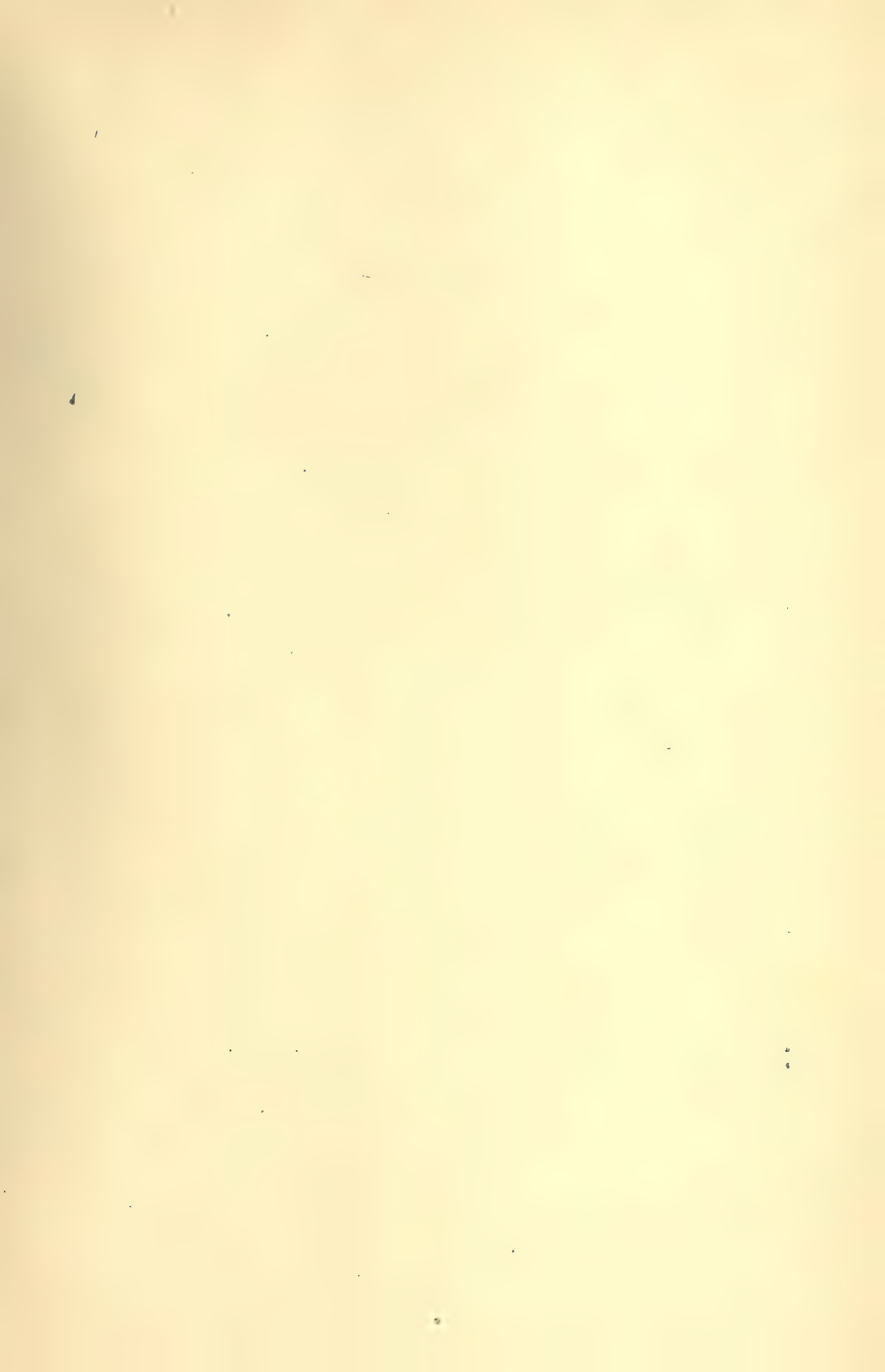
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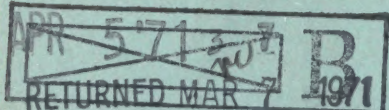


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